

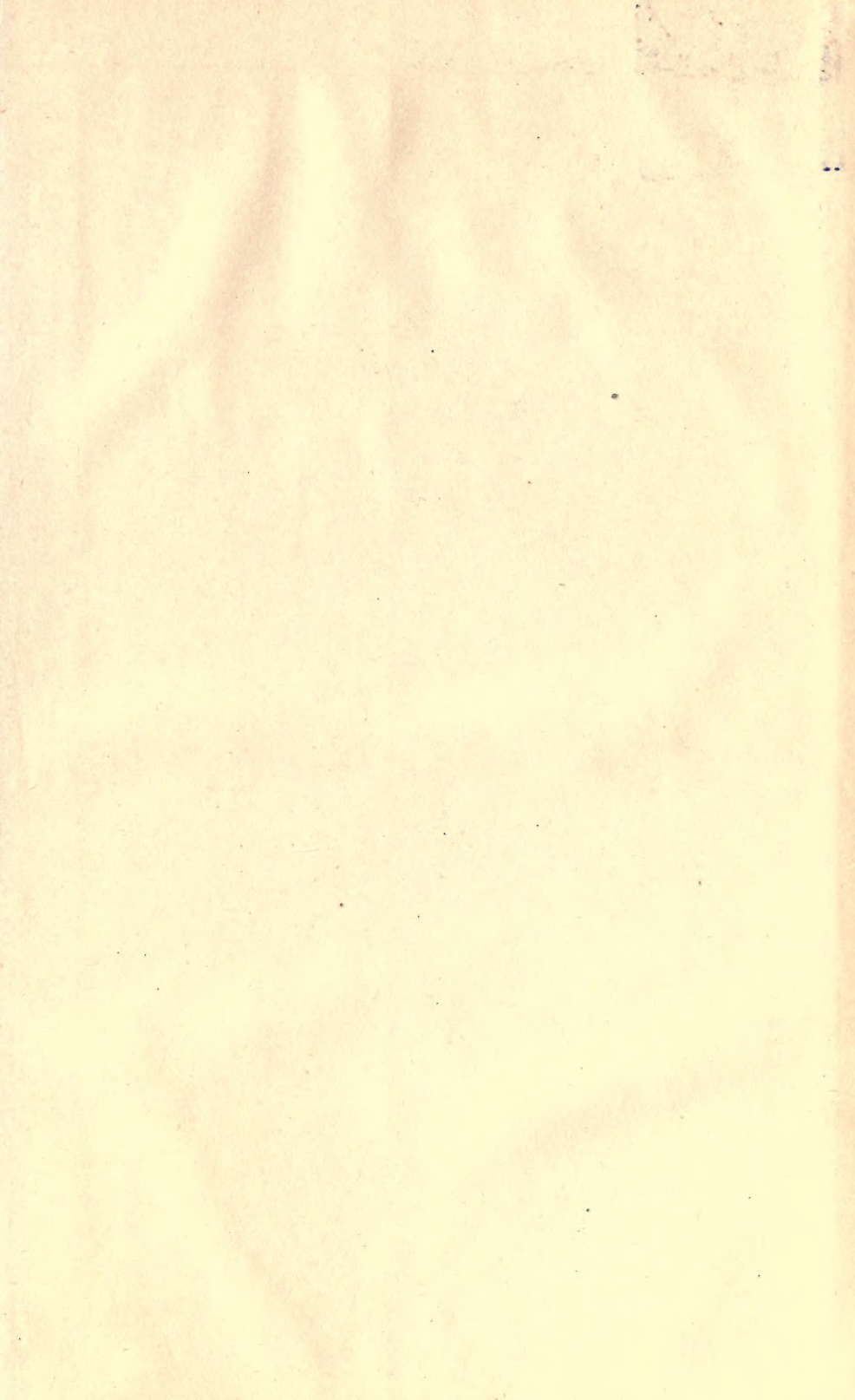
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*New York (State) Reports. Supreme Court*  
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# PRACTICE REPORTS

IN THE

# SUPREME COURT

AND

# COURT OF APPEALS

OF THE

# STATE OF NEW YORK.

BY NATHAN HOWARD, JR.

COUNSELLOR AT LAW, ALBANY

**VOL. VI.**

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# PRACTICE REPORTS.

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## SUPREME COURT.

HICKS agt. HINDE AND BEARDSLEY.

The drawer of a draft who signs as "agent" is not personally liable, where the principal is known.

His engagement is like that of an endorser of a promissory note, and where restrictive or qualifying words are added, to his signature, it is equivalent to a declaration that he will not be personally liable (*see* 1 *Cow.* 514).

*Saratoga Circuit, October 1850.* This action was brought on a draft dated August 1st, 1848, drawn by the defendant Hinde, as agent, on the defendant, L. T. Beardsley, in favor of the plaintiff Hicks, for \$120.82. Hinde signed the draft "John Hinde, Agent." The draft was accepted by Beardsley, but was not paid by him when it became due. It was protested for non payment, and notice was given to Hinde. Hinde, at the date of the draft, had charge of a factory in Waterford for Beardsley as his agent. Beardsley authorized Hinde to draw the draft as his agent. It was drawn for rent due by Beardsley to Hicks. At the time the draft was given and accepted by Hicks—Hicks, Hinde and Beardsley were together. Hicks knew when he accepted the draft that Hinde was Beardsley's agent, and that Hinde was authorized by Beardsley to draw the draft as his agent, and that he signed it as such agent. The plaintiff objected to all parol evidence in relation to the draft.

E. F. BULLARD, *for Plaintiff.*

WM. H. KING, *for Defendant Hinde.*

PAIGE, Justice.—It is insisted on the part of the plaintiff that Hinde is personally liable on the draft, as it does not appear on the face of the draft that he signed it as agent for Beardsley. It

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Hicks agt. Hinde and Beardsley.

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is also insisted that parol evidence is inadmissible to explain, add to or vary the draft. The case of *Pentz vs. Stanton* (10 *Wend.* 271), is cited in support of these propositions. In that case one West was the agent of a manufacturing establishment, and as such purchased a quantity of dye stuffs for the use of the factory without disclosing the name of his principal; and the bill of goods was made out against West as agent, without stating the name of the principal, and West, as agent drew a draft on one Carey in favor of the plaintiff, for the price of the goods, and signed the draft, H. F. West, agent. The name of the principal was not disclosed to the plaintiff by the agent at the time of the purchase of the goods and giving of the draft, and the agent did not inform the plaintiff that he was authorized by his principal to draw the draft as his agent.

In this case the name of the principal was disclosed, and the plaintiff knew that Hinde was authorized by Beardsley, his principal, to draw the draft in question, as his agent, and that he actually signed it as such agent.

It appears from the evidence that Hinde did not intend to bind himself personally. If he had added to his signature "*Agent for L. T. Beardsley,*" instead of agent merely, it will be conceded that he would not have been personally bound (*Brockway vs. Allen*, 17 *Wend.* 40; *Randall vs. Van Vechten*, 19 *John.* 60; *Skinner vs. Dayton*, 19 *John.* 554, 548; *Bank of Columbia vs. Patterson*, 7 *Cranch*, 299, 307; *White vs. Skinner*, 13 *John.* 307; 2 *Kent. Com.* 630, and *N. A. 6 ed.*; 4 *Wend.* 285; 15 *John.* 1).

A contract not necessary to be in writing, under seal, will be binding on the principal, if it appears in any part of the instrument that it was intended to be executed by his agent for him, in the character of agent merely (*Evans vs. Wells*, 22 *Wend.* 335; *Per Chancellor*).

The case of *Hills vs. Bannister* (8 *Cow.* 31), was overruled by the case of *Brockway vs. Allen* (17 *Wend.* 41). If in *Taft vs. Brewster* (9 *John.* 334), it had been shown that the Baptist society of Richfield was a corporation, and that the bond given by the defendants was given for a corporate debt, and that the de-

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Hicks agt. Hinde and Beardsley.

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fendants were authorized to execute the bond, they, as the law is now understood, could not have been held to be personally liable. In *Mott vs. Hicks* (1 *Cow.* 514), where a note was made payable to J. Horsefield or order, and endorsed by him "*J. Horsefield, agent,*" it was held that although nothing appeared to show that he was in fact agent, yet he was not liable as endorser. The endorsement was regarded as special, and equivalent to a declaration that the endorser would not be personally liable (1 *Cow.* 534, 538). The acceptor of a bill of exchange, like the maker of a note, is considered as the original and principal debtor and primarily liable, and the drawer and endorsers are considered as sureties, liable as such, guaranteeing the performance of the principal's contract (*Chit. on Bills* 26, 192). The engagement of the drawer, like that of an endorser, is conditional, viz: that he will pay the bill provided it is presented in proper time to the acceptor and he fails to pay it; and provided also that he is duly notified of the dishonor of the bill (20 *John.* 366). The drawer may, like the endorser, add to his signature restrictive or qualifying words, to exempt himself from personal liability (*Chit. on Bills*, 32, 33, 34, 234). A transfer by endorsement of a bill, is equivalent in its effect to the drawing of a bill, the endorser being in almost every respect considered as a new drawer on the original drawee (*Chit. on Bills*, 241; 1 *Salk.* 133; 3 *East.* 482). And a promissory note endorsed, may be declared on as a bill of exchange. The maker of the note stands in the situation of the acceptor of a bill (*Chit. on Bills*, 241-2). The obligation which an endorsement imposes on the endorser to the endorsee, and the mode in which that obligation may be extinguished, is in all respects exactly similar to that which a drawer of a bill is under to the payee. And Lord Ellenborough, in *Billingalls vs. Gloster* (3 *East.* 482), says, "when it is laid down that an endorser stands in all respects in the same situation as a drawer, all the consequences follow which are attached to the situation of the latter" (*Chitty on Bills*, 241, 242, 10 *Am. from 9 Lond. ed.*).

If the drawer of an accepted bill is like an endorser, considered as a surety, and stands in all respects in the same situation, as an



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Hicks agt. Hinde and Beardsley.

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endorser, and may like an endorser add to his signature restrictive or qualifying words to exempt himself from personal liability, it would seem necessarily to follow, that whatever restrictive or qualifying words exempt an endorser from personal liability, will have a like effect upon a drawer, when added to his signature. If this proposition can not be disputed, then the case of *Mott vs. Hicks*, (1 *Cow.* 514) disposes of this case. There the addition by the endorser to his endorsement of the word "agent" was held to be equivalent to a declaration that he would not be personally liable. Why should not, upon principle, the same effect flow from the addition of the same word by Hinde to his signature to the draft in question?

There are some cases of ambiguities, where the words are equivocal, but which admit of precise and definite application by resorting to the circumstances under which the instrument was made. In such cases parol evidence is admissible of the circumstances attending the transaction (2 *Cow. & Hill Notes* 1358; *Peisch vs. Dickson*, 1 *Mason R.* 10, 11, 12).

In *Stover vs. Logan* (9 *Mass.* 55), being an action by the payee against the drawee of a bill of exchange, parol evidence was received of verbal conditions and restrictions, subject to which an absolute written engagement of the drawee to accept the bill was made, such verbal conditions and restrictions, having been communicated to the payee by the drawer at the time the bill was drawn: so in case of a blank endorsement of a note or bill of exchange, contemporaneous parol stipulations, showing that the endorsement was intended to be restrictive, is admissible in evidence upon the principle that the written engagement is left incomplete by the parties (2 *Cow. & H. Notes*, 1473; 11 *Mass.* 31).

In Louisiana a person may draw as agent upon his principal for a debt not personal to himself, but due by the principal to the payee, without expressing the agency on the face of the bill (*Wolfe vs. Jewett*, 10 *Curry*; *Louis R.* 583).

In the *Mechanics' Bank of Alexandria vs. The Bank of Columbia* (5 *Whea.* 326), where a check was drawn by a person who was the cashier of a bank, but without affixing to his sig-

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Hicks agt. Hinde and Beardsley.

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nature his title of cashier, parol evidence was received to show that he signed the check as cashier.

But I prefer to place the decision of this case on the ground that the drawing of the draft by Hinde is restrictive; and that the addition of the word agent was, as was held in *Mott vs. Hicks*, equivalent to a declaration that he would not be held personally responsible on the draft.

This case may be distinguished from the case of *Pentz vs. Stanton*. In that case the name of the principal was not disclosed to the vendor by the agent at the time of the purchase of the goods and giving of the draft for the price of the goods. The non disclosure of the principal made the agent personally liable for the goods, and being so liable, it was proper he should be held personally liable on the draft (*Dunlap Paley Agency*, 371, 2; 2 *Kent Com.* 630; 20 *Wend.* 434; *Per Chan*).

In the case of *Stackpole vs. Arnold* (11 *Mass.* 27), cited and relied on in the case of *Pentz vs. Stanton*, the agent affixed his own signature to the promissory notes, on which the suit was brought, without any superadded restrictive or qualifying words; and at the time he gave the notes he did not disclose to the payee the name of his principal. Neither that case nor either of the other cases relied on in the case of *Pentz vs. Stanton*, resemble the present case.

Upon the whole, I have come to the conclusion that the defendant Hinde is not personally liable on the draft in question. Judgment must therefore be entered in his favor.

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Jordan agt. Garrison.

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## SUPREME COURT.

JORDAN agt. GARRISON.

The place of trial of a transitory action should be in the county where the principal transactions between the parties occurred, and where it appears the largest number of the witnesses, who know any thing of the facts reside. A majority of witnesses should not necessarily control.

An affidavit of merits (to change the place of trial) which states that the party has fully and fairly stated "*the facts of this case*" to his counsel, held sufficient; and equivalent to the statement that he has fully and fairly stated "the case" to his counsel as required by Rule 39.

*Albany Special Term, March 1851. Motion to change the place of trial from Ulster to Orleans.* The action is brought to recover for the wood work of six wagons alleged to have been sold and delivered by one Schoonmaker to the defendant, at the price of \$23 each. On the 20th of December 1850, Schoonmaker assigned the demand to the plaintiff. The defendant states, in his affidavit, that having himself removed from Ulster county to Orleans, he requested Schoonmaker to make and send, or bring to him, the wood work of a wagon, which he did, in the year 1847, and for which he paid him \$23; that at the same time, he brought with him the wood work of five other wagons, to sell on his own account; that being unable, after remaining about two weeks, to sell them, he left them with the defendant, with authority to sell them for him; that he did sell as many as he could, and accounted with Schoonmaker for the proceeds, and the remainder he deposited in a safe place, subject to the order of Schoonmaker, and informed him thereof; that at the time of the transfer of the demand, Schoonmaker was indebted to the defendant to the amount of \$111.90, for cash, storage, drawing lumber, building hen coops and drawing them to Holley, board, lumber, cash paid for freight, a pair of boots, cash lent, 26 barrels of apples, and for work, labor and services by the defendant and his team. The defendant then names 16 witnesses residing in Orleans, where all these transactions occurred, and states specifically, the point of defence which he expects to establish by each witness.

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Jordan agt. Garrison.

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In swearing to merits, he states that "he has fully and fairly stated *the facts in this case* to Horace J. Thomas," &c. and that he has a good and substantial defence on the merits, &c.

The plaintiff in an affidavit, drawn in the usual form, swears to 18 witnesses residing in Ulster and then states that he expects to prove by Schoonmaker, one of the witnesses, the sale of the demand to the plaintiff, and the sale of the property to the defendant; and further, all the facts in issue. That he expects to prove by *six* other witnesses the value of the wood work of the wagons; by *nine* others, acknowledgements of the defendant, made at various times, that the work had been sold to him, and his promises to pay therefor; and by *one* other witness the handwriting of the defendant to certain letters written by the defendant to Schoonmaker on the subject of the property.

T. R. WESTBROOK, *for Plaintiff.*

S. H. HAMMOND, *for Defendant.*

HARRIS, Justice.—It is obvious from the mere statement of the facts set forth in the affidavits read upon this motion, that the cause should be tried in Orleans. The transactions between the parties all occurred there, and there all the witnesses who appear to have any knowledge of those transactions, with the exception of Schoonmaker himself, reside. Although the plaintiff has sworn to a greater number of witnesses in Ulster than the defendant has named in Orleans, yet I am not satisfied that the plaintiff will, in fact, have occasion to call, upon the trial, any of those named by him, except Schoonmaker. He being himself a party to all the transactions, is, of course, cognizant of all the facts. The plaintiff, accordingly swears that he expects to prove by him all the facts in issue in the suit. On the contrary, although the amount in controversy is not large, I can not see why the defendant will not be obliged to call the greater part if not all the witnesses named in his affidavit. It is worthy of notice, too, that the plaintiff, although he had the opportunity, has not denied or explained any of the statements in the defendant's affidavit. Upon the merits, therefore, I am clearly of opinion that the defendant is entitled to prevail upon this motion.



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Jordan agt. Garrison.

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But a point has been made upon the sufficiency of the defendant's affidavit of merits. The 39th rule of this court requires that the party who makes an affidavit of this description, in addition to what had usually been inserted, shall swear that "he has fully and fairly stated *the case* to his counsel." Here, the affidavit states that the defendant has fully and fairly stated "*the facts of this case*" to his counsel. It is insisted that this departure from the terms of the rule is fatal to the sufficiency of the affidavit.

It is true, that a compliance with the requirements has been enforced with great strictness. Although, since the adoption of the 48th rule, which has had the effect to change very essentially the character of the affidavits used upon such motions, and since the court has come to be governed more by the nature of the controversy, and the facts to be established by the witnesses, than the number sworn to by the parties, a rigid adherence to a particular form in swearing to merits may not be so important as before, yet I am not aware that the rule has been, and perhaps, it ought not to be, relaxed. But I do not think the rule has ever been construed so strictly as to condemn an affidavit made in the terms of that now under notice. The cases relied upon by the plaintiff's counsel are Cary vs. Livermore (2 *How.* 170), Bleecker vs. Storms (*id.* 161), Fitzhugh vs. Truax, (1 *Hill*, 644), Richmond vs. Cowles (2 *Hill*, 359), Britain vs. Peabody (4 *Hill*, 61), and reporter's note at page 64. But I do not think any of these authorities sustain the objection to the affidavit. In the case first cited, there was an entire omission of the allegation that the party had fully and fairly stated the case to his counsel. In the other case cited from Howard, the party had sworn that he had stated *the case in the cause* to his counsel, but had omitted to state that the case had been *fully and fairly stated*. In Fitzhugh vs. Truax, an affidavit that the party had stated the facts of *his case* to counsel was held to be insufficient. This decision seems to be in conflict with that in Brownell vs. Marsh (22 *Wend.* 636), where it was held that an affidavit that the party had fully and fairly stated *this case*, or *his case*, to counsel, was a sufficient

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Crofts agt. Rockefeller and others.

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compliance with the rule. In *Richmond vs. Cowles*, the defect in the affidavit was, that it only stated that the party had fully and fairly stated *his defence* to counsel. The same defect was held to be fatal in *Rickards vs. Swetzer* (3 *How.* 413). In *Brittan vs. Peabody*, the defect was in merely swearing that the party *believed the advice* of his counsel that he had merits. In all these cases there was a substantial departure from the requirement of the rule. But it has never been held that the affidavit must be made in the very words in which the rule is expressed. In *Brownell vs. Marsh*, BRONSON, J., said that "an affidavit that a party had fully and fairly stated *this case*, or *his case* to counsel, fairly implies that he had stated *the whole case*." So here, the affidavit that he has fully and fairly stated *the facts in this case*, fairly implies that the party has stated *all the facts* which make *the whole case*. In *Rickards vs. Swetzer*, above cited, Mr. Justice GRIDLEY refers to the expressions, "the case," and "the facts of the case," as importing the same thing, and as equally sufficient. I confess my own discrimination is not sufficiently acute, to enable me to discover any difference in the meaning of the two expressions. To state *the case*, the party must necessarily state the *facts of the case*, and in stating the *facts of the case*, he necessarily states the case.

The motion must, therefore, be granted, with ten dollars costs to the party finally successful in the action.

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## SUPREME COURT.

### CROFTS agt. ROCKEFELLER AND TWO OTHERS.

Where several defendants defend successfully by different attorneys, *who are partners*, but one bill of costs can be allowed.

It is otherwise where the attorneys are not partners (6 *How. Pr. R.* 336; 6 *Hill*, 267).

*July Special Term*, 1851. This was an action brought to recover possession of real property in the county of Colambia. Dewitt Miller, Esq. appeared and answered for Rockefeller, & d

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Crofts agt. Rockefeller and others.

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Henry Miller, Esq. for the two other defendants. Dewitt Miller Esq. and Henry Miller Esq. were copartners in the practice of the law. On trial at the circuit a verdict and judgment were given for the defendants. Two separate bills of costs were claimed by defendants' attorneys. The bill of Dewitt Miller, for defendant Rockefeller, was taxed at \$97.75, and subsequently paid. The bill of Henry Miller, was afterwards allowed on adjustment by the clerk, at \$24. All the items in the last bill were for services of attorney and counsel. The plaintiff appealed from the taxation of the last bill. The question presented on taxation and on appeal was, whether, the attorneys being partners, the defendants were entitled to separate bills of costs.

R. McCLELLAN, *for Plaintiffs.*

K. MILLER, *for Defendant.*

PARKER, Justice.—Under the late practice, it was well settled that where the attorneys who appeared for different defendants, were partners, they could tax on recovery against the opposite party, but one bill of costs. With reference to costs, a firm consisting of two or more attorneys, was regarded as one attorney. It is claimed by the defendants' counsel that the rule ought to be otherwise now, in as much as costs are declared to belong to the party (*Code*, § 303). But costs always belonged to the successful party, and not to his attorney; though the bill of costs recovered may not be now, as it was formerly, the measure of compensation between the party and his attorney.

In *Tracy vs. Stone* (5 *How. Pr. R.* 104), it was decided that where two defendants defend by the same attorney and answer separately, and verdict and judgment are given in their favor, but one bill of costs could be allowed. There is no difference between defending by the same attorney and defending by different attorneys who were partners. In *Collomb vs. Caldwell* (5 *How. Pr. R.* 336), relied on by the defendants' counsel, the defendants defended separately, and separate bills of costs were allowed. I have no doubt that was a case where the attorneys defending were not partners, though nothing is said as to that fact by the

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Sprong agt. Snyder.

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reporter. It will not be denied but separate bills of costs may be recovered where separate attorneys, not connected in business, are employed. Such was the late practice (*Ten Broeck vs. Paige*, 6 *Hill*, 267).

There is nothing in the Code that requires a change of the practice as laid down in the case last cited. Nor is there any reason why successful defendants should recover, where they employ two attorneys in partnership, more costs than where they employ a single attorney to defend. The services rendered are the same in both cases, and no increased compensation in the former case is called for by way of "indemnity."

The motion must be granted without costs of motion to either party.

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### SUPREME COURT.

SPRONG agt. SNYDER.

A motion for an extra allowance of costs, in cases tried by referees, may be made at any place where, under the restrictions of § 401, any other motion in the action might be made. (*The case of Niver agt. Rossman*, 5 *How. Pr. R.* 153, *not concurred in.*)

An extra allowance can not be had in an action brought to restrain the foreclosure of a mortgage. It is not a case within § 309.

*Albany Special Term, March 1851. Motion for extra allowance.* The action was brought to restrain the foreclosure of a mortgage. The venue is in Schoharie. The cause was tried by a referee, who decided in favor of the plaintiff. The hearing and argument before the referee continued four days. The question litigated seems to have been whether the plaintiff, who was a purchaser of the mortgaged premises, was chargeable with notice of the defendant's mortgage.

J. H. RAMSAY, *for Plaintiff.*

THOMAS SMITH, *for Defendant.*

HARRIS, Justice.—There is nothing in the papers upon which this motion is founded, showing that the plaintiff is entitled to



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any costs at all, but as it seems to have been assumed by both parties, that the plaintiff is entitled to costs, I infer that the referee in deciding the case in favor of the plaintiff awarded him costs. I shall, therefore, assume that the question of an extra allowance is properly before me.

The defendant's counsel insists that the motion should have been made in Schoharie, and relies upon the case of Niver agt. Rossman (5 *Howard*, 153), as an authority supporting his position. It is true that the learned judge, whose decision is referred to, seems to think that the terms of the 86th rule requires the application, in a case like this, to be made in the county where the trial has been had. In this conclusion I can not concur. I do not understand the rule mentioned as having any application whatever to cases of this description. The learned judge, whose opinion is cited, himself admits that it was not intended to make the rule applicable to such cases, and yet he thinks it has been so expressed as to require that it should be so applied; I am unable to perceive this necessity. Where "*a trial is had*," the rule confines the application for an additional allowance to "the court before which such trial is had." This clearly presupposes that there has not only been a trial, but that it has been had before some court. This branch of the rule can only be applicable to such a case. Of course, it can not be applicable to a trial before a referee, for such a trial, although it is declared that the decision shall stand as the decision of the court, certainly is not, within the meaning of the rule, a trial before a court. If it were, it would be necessary to make the application to the referee before whom the trial was had. One other class of cases is provided for, in the last clause of the rule. These cases as such as, though not tried upon any issue of law or of fact, are heard by the court at the circuit or special term, and judgment rendered therein upon such hearing. It is to this class of cases that the second paragraph in the 308th section of the Code refers. In these cases, the rule declares that the application for an additional allowance shall be made to the court "*before which the judgment is rendered*." If the Code permits an addi-

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Hornfager and others agt. Hornfager.

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tional allowance to be made in any other case, the mode of such application is not prescribed by the rule. What court is it that *renders judgment* upon the decision of a referee? I understand it to be the Supreme Court—not the Supreme Court of Schoharie, or of Albany—but of the state of New York. If this be so, the motion for an allowance may be made at any place where, under the restrictions of the 401st section of the Code, any other motion in the same action might be made. I think, therefore, that the motion is properly made in Albany.

But there is another difficulty in the plaintiff's way, which seems to me to be fatal to his motion. The action is not brought for the recovery of money or property—neither is it brought for any of the purposes specified in the second clause of the 308th section of the Code. The action is brought for the sole purpose of restraining the collection of a mortgage. The plaintiff has succeeded, but the judgment he has recovered is not within the enumeration of cases contained in the 309th section of the Code, prescribing the rates at which the additional allowance when made, shall be estimated. I can not see that the court has any power to make an additional allowance in such an action. For this reason the motion must be denied, but without costs.

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### SUPREME COURT.

HORNFAGER and others agt. HORNFAGER AND HORNFAGER.

THE SAME agt. HORNFAGER AND OTHERS.

An amended complaint alleging matters which occurred subsequent to the service of the original, is irregular, and may be set aside on motion, or the new subsequent matter may be stricken out.

*It seems*, that but one set of papers, one rule and the costs of one motion only, will be allowed in two causes, where the object of the motions are alike in both, and made at the same time.

*Columbia Special Term, January 1850.* Motion by the defendants to set aside the amended complaint in each of these actions, on the ground that matters are alleged therein which had occurred after the service of the original complaint, or, in

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case such amended complaints are not set aside, that the matters arising after the service of the original complaints, and inserted in the amended complaints, be stricken out. The actions are brought for the partition of lands. The original complaints were served on the defendants' attorney on the 21st of September 1850. On the 18th of December following, and after the defendants in each action had put in their answers, the plaintiffs' attorney served amended complaints in each action, stating among other things, by way of amendment, that "one of the plaintiffs, Wm C. Hornfager, on or about the 28th day of October 1850, conveyed by deed to one Jonathan S. Ely, all his right, title and interest in the premises described in the complaint, and that by virtue of such conveyance the said Jonathan S. Ely became entitled to one equal undivided fourth part of the premises. Ely was not made a party to the actions.

H. HOGEBOOM, *for Plaintiffs.*

J. C. NEWKIRK, *for Defendants.*

HARRIS, Justice.—Amendments to a pleading can only relate, properly to the time when the original pleading was made, and can only state facts in existence at that time. To introduce matters occurring at a subsequent date, would render the record incongruous. Such matters should be brought before the court by a supplemental pleading (1 *Barb. Ch. Pr.* 207; 2 *id.* 63, 64). In this case the interest of the plaintiff William C. Hornfager, having been transferred to Ely after the original complaints had been served, the remaining plaintiffs should have applied, under the 177th section of the Code, for leave to make a supplemental complaint, making Ely a plaintiff or defendant in the actions, instead of William C. Hornfager. In that case the court might, under the authority contained in the last clause of the 121st section, substitute Ely as a party in the place of his grantor. The amendmets, therefore, so far at least as they seek to bring forward this new matter are clearly irregular. The amended complaints might properly be set aside, but as there may be other matters in the amendmets which may properly be the subject

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Graham agt. Stone.

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of amendment, it is perhaps better, and will subserve the defendants' purpose equally well, to strike out of the amended complaints all statements of facts which have arisen since the original complaint was made. This result renders it unnecessary to consider the other questions which were discussed by counsel upon the argument. But one set of papers and one motion was necessary. But one rule upon this decision is to be entered in both actions. The defendants are to be entitled to the costs of one motion only. A clause may be inserted in the rule allowing the defendants twenty days further time to answer the amended complaints.

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### SUPREME COURT.

GRAHAM agt. STONE and STONE.

In actions of slander where the defendant denies the charges in the complaint, he can not set out in his answer matters in mitigation of damages which do not constitute a defence to the action, or which could not be proved on the trial.

And in such actions (under the Code), where the answer nowhere alleges the truth of the defamatory charges, but denies them—facts and circumstances which are proper subjects of proof in mitigation of damages can not be set up or alleged by the defendant. It is only matter constituting a defence to the action, which is properly pleadable, now as before the Code.

But the Code has made one essential change in the pleadings and evidence in actions of slander and libel, that is, where the defendant alleges the truth of the defamatory charges, or justifies, he may allege and prove any mitigating circumstances (which the well established rules of law allow) to reduce the amount of damages (§ 165). And whether the justification is proved or not, such mitigating circumstances may be given in evidence.

*Steuben Circuit and Special Term, February 1851.*

JOHNSON Justice.—The answer contains a full and explicit denial of the speaking of the slanderous words charged in the complaint, or any or either of them. There is no justification set up in the answer. But the defendant has attempted to interpose certain matters as a defence, or by way of mitigation, in his answer, consisting of scandalous reports concerning the plain-



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tiff in the neighborhood, characterized in the answer as "*common gossip*," and which the defendants confessedly did not believe and admit to be untrue.

To this last portion of the answer the plaintiff demurs and assigns several distinct causes or grounds of demurrer.

I think the demurrer to this branch of the answer is well taken. It is not matter constituting a defence to the action; nor is it even matter which could be proved upon trial in mitigation of damages, after proof of the speaking of the words by the plaintiff. It is not now, and never was issuable matter and the plaintiff ought not to be compelled to take issue upon it. This part of the answer, therefore, is clearly bad as not containing matter constituting a defence to the action or facts which could be proved upon trial in mitigation of damages.

The plaintiff's counsel has raised and discussed one question upon this demurrer, the proper settlement and disposition of which is of great practical importance under our present system of pleading.

It is insisted by him that an action of slander under the Code, where the defendant denies the speaking of the words in his answer and does not in any part of it allege the truth of the matter charged as defamatory—facts and circumstances which are proper subjects of proof in mitigation of damages, according to well established rules, should not be set up or alleged in the answer. I have bestowed considerable attention upon this question and am of the opinion that the counsel is correct. The distinction between the defence to an action and mitigation of the damages, is well understood by every lawyer. Before the Code nothing was better settled than that every plea must contain such matters of defence as would constitute an entire bar to the action, and that those partial defences which did not affect the *right* of recovery, but the *amount* merely, could not be pleaded. They were not issuable matters (*Harman vs. McFarlan*, 4 *Denio*, 511, 513). The general bad character of the plaintiff could not be pleaded, as that did not constitute an entire defence to the action.

The general rule of pleading is unquestionably the same under

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the Code (§ 149). The new matter constituting a defence, mentioned in the second subdivision, must be taken to mean a defence in bar of the action, as the general term was before used and understood in legal proceedings. It has been repeatedly decided under the Code, and is now well settled, that mere evidence is not pleadable. It is only matter constituting a defence *to the action* which is properly pleadable now, as before the Code. This should constantly be kept in view to avoid intolerable prolixity, tautology, and immateriality in pleading, into which we shall otherwise, under our present system, be in danger of falling. Clearness and brevity are excellencies particularly commendable in all pleaders under our present system.

The Code has made one, and one only, essential change, in the rules of pleading and evidence in actions of slander and libel. Formerly, if a defendant did not plead the general issue, but justified by plea the speaking of the words charged, he was compelled upon trial to rely upon his justification alone, and could not resort to evidence in mitigation of damages, as he could where the speaking of the words was denied. This is now altered by the Code, § 165. It is there provided that in such actions the defendant may in his answer allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages—and whether he prove the justification or not, he may give in evidence the mitigating circumstances. The defendant may now, notwithstanding his plea of justification, resort to the same proof in mitigation of damages that he could before, under the general issue, whether he proves his justification or not, provided he alleges the mitigating circumstances in his answer.

The right to allege the mitigating circumstance, in the answer, was doubtless intended to be confined to those cases where the defendant in his answer alleged the truth of the matters charged as defamatory. In other words, where he justified, and the section should be so construed. Where the speaking of the words is denied, any such allegation in the answer is unnecessary. The evidence may be given the same as formerly under the general

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Morse agt. Keyes.

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issue, and the pleadings ought not to be encumbered with such unnecessary details. It is proper here to notice an error into which the defendants' attorney, in common with many others of the profession, has fallen in regard to the character of the mitigating circumstances which a defendant is authorized to allege in his answer by § 165. It is often met with in pleadings in this kind of action under the Code. It has been supposed that the terms "any mitigating circumstances to reduce the amount of damages," in this section, conferred the right upon the defendant to allege any thing and every thing he might deem proper in excuse or palliation of the offence charged, without reference to the previous well established rules of law as to what might and what might not be proved in mitigation of damages. This error can not too soon be corrected. The section in question is liable to no such construction. No enlightened legislative body could for a moment be so regardless of the value and safety of character as to break down so entirely every defence which the wisdom of ages had built up for its protection, and leave it upon trial in court liable to be assailed by every insinuation or suggestion of every hatred, prejudice, popular clamor, and every common gossip, which is here gravely set up as a defence.

"Any mitigating circumstances," as here used, means any circumstances, which the well established rules of law allow as evidence in mitigation of damages, and nothing more. The plaintiff is entitled to judgment upon the demurrer, with the usual leave to defendants to amend upon payment of costs.

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SUPREME COURT.

MORSE Plaintiff in error agt. KEYES Defendant in error.

A "wagon" is by no act of the legislature exempt from levy and sale under execution.

*General Term,* 1851. The plaintiff was a householder and owned a one-horse lumber wagon; he was a mason by trade. The defendant was a constable and had an ex-

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execution against the plaintiff, and took and sold the plaintiff's lumber wagon, for which the plaintiff sued the defendant before a justice of the peace, and recovered \$15 damages and \$4.42 costs. The defendant removed the action by a certiorari into the Court of Common Pleas of the county of Otsego, and that court reversed the previous judgment for the following causes as appears from the record:

1. That the wagon was not exempted from levy and sale under execution.

2. If the wagon was exempt in any case, there is no legal evidence in this cause that it was necessary for the plaintiff.

3. That the justice erroneously received the opinion of witnesses as evidence of the wagon's being necessary for the plaintiff.

By the Court Cady, Justice.—By 2 R. S. 367, § 22, various articles of the personal property of a debtor, being a householder, are exempt from levy and sale under any execution. Some articles are exempted without any qualification; others are exempted if *necessary*. For example, all sheep to the number of ten; all *necessary* pork, beef, fish, flour and vegetables, actually purchased for family use; all necessary wearing apparel, beds, &c. The tools and implements of any mechanic *necessary* to the carrying on of his trade, not exceeding \$25 in value.

In 1842 the legislature added to the articles before exempt, *necessary* household furniture and working tools and team to the value of not exceeding \$150.

These exemption laws, although in derogation of the common law rights of creditors, are intended not only to operate in favor of debtors, but also in favor of the public. The public have an interest that every mechanic shall have the necessary tools to carry on his trade; but these laws often tend to embarrass constables and sheriffs in the execution of a final process. It is not always in the power of a sheriff or constable to know on what property he can safely levy. There is no difficulty in selecting the articles specifically exempted; but when it becomes necessary for the officer to determine the *value* of articles, or what articles



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are *necessary*, and to act at his peril, there is difficulty and hazard in performing his duty. When the officer has to judge of the value of property, or determine whether the property is *necessary* for the debtor, and the debtor knows it is levied on; knows that it is advertised for sale, and interposes no claim until after the sale, the officer ought to be protected as far as the rules of law will possibly permit, and perhaps it might be a reasonable rule that whenever an officer levies on property, and the question whether it be exempt from levy and sale depends on the value of that or other property which the debtor has, or upon the question whether it be, or be not *necessary*, and the debtor makes no objection until after the sale, he shall be deemed to have consented to the sale.

That question, however, does not arise in this bill of exceptions. Whether the plaintiff in this case did or did not object to the sale; does not appear. In this case the officer had to act at his peril and determine whether the wagon in question was exempt from levy and sale on execution; he decided that it was not exempt, and therefore levied on and sold it. The justice decided that it was exempt; the Court of Common Pleas held that it was not, and this court must now determine whether the Court of Common Pleas erred or not.

A wagon, whether a single or double one, is not an article which is exempt by name from levy and sale under execution; it does not come within the words of the Revised Statutes, "the tools and implements of any mechanic necessary to the carrying on of his trade, &c." If exempt, it must be so by force of the act of 1842. What words in that act include a wagon? It must be included in the words "working tools," or within the word "team," or it is not exempt. It is only for the legislature to determine what property shall be exempt from levy and sale on execution, and it is not for the court to give any strained construction to any words which the legislature has seen fit to use, in order to bring within their meaning articles of property which the legislature have not seen fit specifically to designate.

Under the Revised Statutes, a mechanic can claim to have his

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tools to the value of \$25, exempt from execution, and in addition to that he can, under the act of 1842, claim to have his necessary working tools, to the value of \$150, exempt from execution. Taking both laws together, he may have tools to the value of \$175 exempt from execution, if necessary "to the carrying on of his trade." But a wagon can not be said to be a necessary tool, or a working tool for a mechanic. Is a wagon a part of a team? A team is said to be two or more horses or oxen harnessed together. Harness may, therefore, be regarded as exempt; but a wagon, a cart or a sleigh can not be regarded as a part of a team.

It may be asked, why exempt a cartman's team if you do not exempt his cart? That would be a proper question to put to the legislature, but not to the court; and it might with the same force be asked why exempt a farmer's team from execution, but allow all the grain which he has prepared for seed to be taken from him? The legislature has done all it deemed proper, and if enough has not been done, the legislature, not the court, is to extend the exemption.

The judgment of the Court of Common Pleas is affirmed on the ground the a wagon is by no act of the legislature exempt from levy and sale under execution.

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## SUPREME COURT.

RAE agt. THE WASHINGTON MUTUAL INSURANCE COMPANY.

An application for an order that the demurrer be *stricken out* as "*irregular and frivolous*" (under §247), is not a motion for *judgment* on the demurrer, and can not be granted as such, where there is no prayer for general relief. (*This agrees with the decision on this question in Darrow agt. Miller, 5 How. 247.*)

To warrant a judgment under the 247th section of the Code, the case should be entirely clear—palpable upon the statement of the facts; and requiring no argument to make it more apparent.

The party may demur to a reply, "if the reply be insufficient" (*Code, §155*). The question, "*insufficient for what?*" considered.

*At Chambers, 23d August. 1851. Motion for judgment under 247th section of the Code.*

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Rae agt. The Washington Mutual Insurance Company.

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MR. JONES, *for the Motion.*

MR. HOPKINS, *for the Defendant.*

GRIDLEY, Justice.—This is a motion for judgment under the 247th section of the Code, upon a frivolous demurrer; and the counsel for the defendant objects.

1st. That the motion can not be entertained under the notice. The notice is of an application for an *order* that the demurrer be stricken out as *irregular* and *frivolous*, with costs of the motion. Nothing is said of an application for *judgment* on the demurrer, or for *judgment* in the cause; nor is there any prayer for general relief. When a party moves for *specific relief*, and does not pray for any alternate or general relief, and the motion for specific relief is not granted, the application is denied (4 *Paige*, 537; 4 *id.* 229; 5 *id.* 517; 1 *Hof. Pr.* 45, 49). An *order* is a direction of a court or judge in writing, not included in a judgment (§400). A *judgment* is a final determination of the rights of the parties in the action (§ 245). Now an application for an order that the demurrer be *stricken out* as “*irregular* and *frivolous*,” is not a motion for *judgment* on the demurrer or in the action, under the 247th section of the Code. The notice seems rather to have been drawn with reference to relief under the 152d section, which provides for *striking out sham answers* and *defences*. That, however, is a motion to be made before the *court*; while relief under the 247th section may be obtained before a judge on five days notice.

2d. But granting that the motion, instead of being for an order that the demurrer be stricken out as “*irregular* and *frivolous*,” had been for judgment on the demurrer on account of its frivolousness, I am still of opinion that it should be denied. To warrant a judgment under the 247th section, the case should be entirely clear; palpable on the statement of the facts, and requiring no argument to make it more apparent. It was to prevent the effect of a delay until a regular term or circuit, that this section was framed. Under the former practice, you might move for judgment on a frivolous demurrer, or on account of the frivo-

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lousness of a plea, out of its order on the calendar (1 *Wend.* 57), and now, you may move before a judge, on a notice of five days for the same and even more extensive relief. This gives the same remedy against a frivolous reply as formerly existed in the case of a frivolous plea.

In order to determine whether the demurrer is so clearly frivolous as to authorize this summary judgment, it will be necessary to examine the previous pleadings. The action was on a policy of insurance. The answer set forth, as one distinct ground of defence, that the policy was, by its terms, made subject to certain by-laws and conditions annexed to the policy; one of which required every applicant to state in his application the amount of any incumbrance on the property; and that the applicant in his application stated that there was no incumbrance on the same; whereas there was a mortgage on the premises, on which was due of about the amount of five hundred and twenty-five dollars. To this defence the plaintiff replied *that* at the time of the application for insurance, the applicant stated to the agent who took the application, that there was a mortgage on the premises of about five hundred and twenty-five dollars, which was true, as he was informed and believed; that a printed paper was handed to the applicant, the blanks of which were filled up by the agent; and if said paper contained anything different from the foregoing statement, as to incumbrances, the same was improperly and wrongfully obtained from the applicant by said agent; and that, as the plaintiff is informed and believes, the applicant did not falsely state in his said application that said property was not incumbered.

To this replication the defendant demurred for *insufficiency*, because, 1. It attempted to avoid the facts pleaded, without confessing those facts.

2. That it states *evidence* and not *facts*.
3. That it is *argumentative* and not *positive*.
4. That it does not set up facts sufficient to avoid the defence stated in the answer.
5. That it is *insufficient* in as much as it is *uncertain*



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On the argument of this demurrer it is apparent that some important questions will arise. It is to be observed that the defence set up in the answer brings the case within the principle decided in *Jennings vs. the Chenango Insurance Co.* (2 *Denio*, 75) where the conditions annexed were held to be a part of the policy, and the statements in the *application* were held to amount to warranties; which, if not true, rendered the policy void; and where parol evidence, that the applicant told the agent the truth as to those matters, is held not admissible. The party may demur to a reply, "if the reply be *insufficient* (*Code*, § 155). A question may arise as to what defects will render a reply *insufficient*; whether a pleading, that formerly would have been good, on a general demurrer, is to be held *sufficient*, or whether other defects may be reached by a demurrer, according to a suggestion of Justice HAND in *Boyer vs. Brown* (7 *Bab.* 87, 88). "*Insufficient*" for what? "*Insufficient*" as an answer to the previous pleading, in matters of substance; or "*insufficient*" as a compliance with the rules of pleading under the Code? An answer in chancery might be excepted to for "*insufficiency*" when any *material* fact was left unanswered, notwithstanding the answer might contain enough to show the bill to be without equity. In other words, it would be no test of the sufficiency of an answer in chancery, to inquire whether it set up a good defence to the bill.

Again, it will be a question on the argument, whether, taking the reply all together, it can be said to *deny* and *put in issue*, properly under the Code, the allegation in the answer, that the applicant stated in the application, that there was no incumbrance on the property. Another question may be whether the hypothetical statement, in the reply, concerning the "printed paper," is to be held sufficient, or whether the reply can be held to refer by that designation to the application; or whether the epithets "*improperly* and *wrongfully*" will be held sufficiently certain and descriptive of the mode of obtaining the paper in question. Do they indicate *force*, or *duress*, or *fraud*, as the means (and which of these means) of obtaining the paper? The

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following authorities bear upon some of these questions (1 *Ch. Pl. ed. of* 1850, 236, 537, 582, 963; 19 *J. Rep.* 7-36, 37, 38; 19 *J.* 349; 5 *Cowen Rep.* 139, 430; 2 *Maule & Sel.* 378; 1 *Man. & Gr.* 87). It is sufficient to say that here are questions involved, which are far too grave to be disposed of as frivolous. I would not express or intimate any opinion concerning them, but leave them to be argued at the proper time.

The motion must be denied.

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### SUPREME COURT.

**THE PEOPLE ex rel. SHIPMAN agt. THE OVERSEERS OF THE POOR of the town of Barton.**

A common law writ of certiorari issued to bring up the judgment and proceedings in a case of bastardy, can not bring up for review the evidence given upon the trial, or the admission or rejection of evidence.

The scope and object of this writ, when issued to obtain the supervisory power of this court over inferior tribunals, removes nothing but the record or other entry in the nature of the record of the proceedings of the court below.

*Sixth District General Term, July, 1851. MASON, SHANKLAND and MONSON, Justices.*

GEO. S. CAMP, *for Plaintiff.*

DAVIS & WARNER, *for Defendants.*

By the Court, MASON, Justice.— This case comes before the court upon a common law certiorari, brought to review the judgment and proceedings of the Court of Sessions of Tioga county in a case of bastardy, and I am inclined to think that the most if not all of the questions raised upon this return are not within the province of this writ to review. The first question, therefore, which I propose to consider in the case is as to the nature and office of this writ, and it can not be denied by any one who will take the trouble to look into the cases upon this subject in this court, that very loose language has sometimes been employed by judges in regard to this subject. I think, however, we shall have no diffi-

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culty in deducing a safe rule from the cases. It was said by SAVAGE, chief justice, in the case of *Starr vs. The Trustees of Rochester*, that the common law powers of this court upon this writ are confined to an examination of the jurisdiction of such inferior tribunals and to questions of law arising out of their proceedings; not to an examination of their decisions upon questions of fact (6 *W. R.* 566). It was said by NELSON, justice, in the case of *Tallman vs. Bigelow* (10 *W. R.* 421), in speaking of the office of this writ, that the power of this court to revise and correct the errors of inferior tribunals, so far as the jurisdiction of such tribunals is concerned, and the determination of questions of law arising before them and apparent upon the record and history of the proceedings, has been too often adjudged to admit of question. He says again in the case of *Rathbun vs. Sawyer* (15 *W. R.* 452), the facts or evidence before the court are not to be returned any farther than what is necessary to enable the court to determine upon a point of jurisdiction or other questions of law arising in the course of its proceedings. In the case of *Nichols vs. Williams* (8 *Cow. R.* 13, 16), Ch. Justice SAVAGE said a certiorari, except to a justice's court, brings up the record only, not the testimony. And again, in the case of *The People vs. Vermilia* (7 *Cow. R.* 108, 136, 137), Ch. Justice SAVAGE said, upon a common law certiorari we can not notice that part of the return which relates to the evidence. The testimony is no part of the record in the court below. He adds, it is not, therefore, removable either by writ of error or certiorari; and in the case of *Birdsall vs. Philips* (17 *W. R.* 464), in which the office and scope of this writ is examined with great industry and ability by Justice COWEN. He holds that no other questions can be raised upon this writ except those relating to the jurisdiction of the officer or court before whom the proceedings are had, or the regularity of its proceedings, and these questions must arise from the record of its proceedings, and he holds that the decisions and charge of the judge occurring upon the trial can not be reviewed by this writ, and he lays down the general rule that wherever, were the suit at common law, the matter alleged for error is of such a nature that

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a bill of exceptions would be essential to its review by a writ of error, a certiorari will not reach it. This, I have no doubt, is the true rule and may be regarded as the settled boundary of the writ in this court, and its office is now confined within these limits as will be seen by the later cases (Simpson vs. Rhinelander, 20 *W. R.* 103). In this case Judge COWEN says those parts of the proceedings which properly enter into the frame of the record in the court below alone are the proper subjects of return to this writ and which alone this court can legally notice; and the court again say that the doctrine of the case of Philips vs. Birdsall has been reconsidered and will be steadfastly adhered to. This doctrine has since been adhered to in all subsequent cases in this court.

In the case of The People vs. The Mayor, &c. of New York (2 *Hill*, 9, 11), Judge BRONSON said "the writ of certiorari, when issued for the purpose of enabling this court to exercise its supervisory power over inferior tribunals, removes nothing but the record or other entry in the nature of the record of the proceedings in the court below, and if the return contains any thing more it can not be regarded. This rule is in perfect accordance with the writ of error at common law, for a writ of error at common law could not reach any objection arising *de hors* the record (15 *W. R.* 583). Applying this rule as to the scope and office of this writ, I do not see how the point raised upon this return can avail the plaintiff. The fact whether the mother of this child was in indigent circumstances or not, can only be determined by an examination of the evidence given upon the trial, and when determined can not be reviewed upon this writ; and it is very clear, I think, that this court can not review the admission or rejection of evidence upon the trial upon this writ.

This seems to follow from the rule which we have drawn from the cases, and was expressly adjudged in the case of The People vs. the First Judge of Columbia (2 *Hill*, 398). The Court of Sessions assumed to modify the order of filiation in regard to the costs on the application of the defendant, and this is now assigned by him as error. It may be quite questionable whether



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the statute contemplates such an interference with the order on appeal, and I am quite clear that the sessions should not have quashed the order for that reason. It does not lie with the defendant, however, to complain of this error if it be an error. He is not prejudiced by it. And, besides, the statute required the Court of Sessions if they quashed the order of filiation and maintenance for any other reason than upon the merits and facts, to proceed and make an original order of filiation in the same manner as any two justices of the peace may by law make, or else bind over the person charged to appear at the next general sessions (1 R. S. 650, § 39). I am of opinion that the order of the sessions should be affirmed, but this is a common law certiorari, and we can not award costs (Baldwin vs. Wheaton, 262).

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SUPREME COURT.

McCARTHY agt. H. HANCOCK and W. HANCOCK.

Where the defendant only, notices the cause for trial, and omits to move it at the circuit, when he had opportunity, he can not afterwards at a special term move for the dismissal of the complaint, because the plaintiff did not notice or bring to trial. The 23d rule, it seems, was not intended to embrace such a case.

*Onondaga Special Term, July 1851.* This was a motion to dismiss the complaint, for the neglect of the plaintiff to notice and bring the cause to trial at the Onondaga circuit, held in June 1851.

The suit is brought for the appointment of a receiver of the property of the defendant Hugh Hancock, to the defendant William Hancock, on the 9th day of January 1851. An injunction was served with the complaint, and has not been vacated. On motion and affidavits, on behalf of the plaintiff, a receiver was appointed at the Oswego special term, held in April 1851, to whom the property was forthwith delivered, and it is still in his possession.

The cause was not noticed by the plaintiff, but was upon the

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calendar, upon the defendants' notice, who neglected to move it in its order.

N. F. GRAVES, *for the Motion.*

JOHN SESSIONS, *Contra.*

PRATT, Justice —The Code provides that either party, giving notice of trial, may proceed with the cause in its order upon the calendar, and in the absence of the adverse party, take a dismissal of the complaint, or a verdict or judgment as the case may require. I think this provision could not have been in view, when the 23d rule of court was adopted. At all events, it would be unreasonable, after the defendant has himself noticed the cause and placed it upon the calendar, and put the plaintiff to the expense of attending the circuit with his witnesses, to permit him to turn round and take a dismissal of the complaint, on motion at a special term.

He may have neglected to move at the circuit, because the plaintiff was ready for trial. In this case, the plaintiff having obtained all the relief sought by his complaint, has good reason for not noticing the cause and bringing it to trial, as well as for supposing the defendants did not desire him to. Besides, he has a manifest interest in saving the fund already in the hands of a receiver, from the expense of further litigation.

The motion must be denied. I do not think the 23d rule was intended to embrace a case where the defendant might have moved the cause at the circuit, on his own motion, and availed himself of the relief sought by this motion. But as the rule will bear that construction, no costs are imposed upon the defendants.

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Higgins agt. Allen.

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## SUPREME COURT

HIGGINS agt. ALLEN.

A reference to ascertain damages upon an injunction bond filed under the 31st rule of the late Court of Chancery, is not required where the bond does not contain the clause providing for a reference. The remedy is by action on the bond.

But such action can not be brought without leave of the court.

*Albany Special Term, July 1851.*

S. F. HIGGINS, *Plaintiff in pro. per.*

J. K. PORTER, *for Defendant.*

PARKER, Justice.—This action is brought on an injunction bond, taken in 1846, under the 31st rule of the late Court of Chancery. The defendant moves to set aside the summons and complaint served on him on three grounds:

1. That there has been no order of reference, and no reference to ascertain the amount of damages.
2. That no leave has been obtained from the court to prosecute the bond; and
3. That the plaintiff demands judgment for \$500, the penalty of the bond, without application to the court.

The first ground is untenable, for the reason that the bond contains no provision for ascertaining the amount of damages by reference. The last clause required by the 31st rule of the late Court of Chancery is omitted. It was the practice to insert it after the condition of the bond, in the language of the rule as follows: "Such damages to be ascertained by a reference to a master, or otherwise, as the chancellor or vice chancellor, having jurisdiction of the cause in which such injunction issues, shall direct." It was decided in *Gracie vs. Sheldon* (3 Barb. Sc. Rep. 232), that without such a clause in the injunction bond, the court has no jurisdiction to direct a reference for the purpose of ascertaining the amount of damages. The remedy in such case is by action on the bond. Where an undertaking is executed under the 222d section of the Code, which has been enacted in place of the

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31st rule of the late court of chancery, it seems no provision for reference is required to be inserted in the undertaking, but the same section authorizes the ascertaining of damages by reference or otherwise, as the court shall direct. Where the proceeding has been taken under the Code, there is therefore jurisdiction in the court to direct a reference without action, though there be no such consent in the undertaking. But this bond was taken under the former practice and not under the Code.

The next question is, was an order of the court necessary, giving the plaintiff leave to prosecute the bond, before the commencement of the action? In all cases where injunction bonds were taken under the provisions of the Revised Statutes, to stay proceedings at law, they were required to be filed with the register or clerk before the sealing and delivery of the injunction (2 *R. S.* 2d ed. page 117, § 155), and the next section provided that the chancellor or vice chancellor should direct the delivery of any bond executed under the provisions of that article, to the person entitled to the benefit thereof, for prosecution, whenever the condition of such bond should be broken, or the circumstances of the case should require such delivery. By the 31st chancery rule, a bond was required in most other cases of injunction, and it was intended to make a similar practice applicable throughout. Such bonds were always required to be filed before the issuing of the injunction (1 *Barb. Ch. R.* 625) and being placed on file, they could not be removed without the order or leave of the court. The court had the same control over the bond as when it was filed under the statute; and the same practice was adopted by applying for leave to prosecute where the condition of the bond had been broken. The plaintiff was therefore irregular in commencing his action on the bond without the authority of the court. The remedy for such an irregularity is by motion to set aside the proceedings (*Harris vs. Hardy*, 3 *Hill R.* 393).

I regret the necessity for setting aside these proceedings, when it is probable the plaintiff would have been entitled to leave to prosecute, on application for that purpose; and if the proper facts were before me establishing such right, and showing that this



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was the proper place to make such application, I should grant such leave *nunc pro tunc*, and let the proceedings stand, on payment of costs. But the plaintiff has failed to show the facts necessary to entitle him to such relief, and has also failed to show that the bond was filed in this district or in a county adjoining this county, so as to make this a proper place for the application.

This irregularity being fatal to the proceedings, it is unnecessary to examine the third point made by the moving counsel.

Motion granted, with \$10 costs.

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## SUPREME COURT.

EMERSON and CROCKER agt. BURNEY.

On *appeal* from an order under § 349 to the general term, no undertaking or security is required.

In an action for the recovery of the possession of personal property with damages for its detention—the defendant failing to answer, and an order of reference to ascertain the damages of detention, is made upon notice and opposed—such order is appealable to the general term. It involves some part of the merits.

And the appeal taken from such an order is *per se* a stay of proceedings in the action.

*Steuben Circuit and Special Term, May 1851.* In August 1850, E. Corning & Co. having obtained a judgment in the Supreme Court against Harlow L. Emerson, caused an execution to be issued thereon to the sheriff of Steuben county, by virtue of which, the defendant as under sheriff of said county, levied upon a drove of sheep and horses as the property of said H. L. Emerson. Soon afterwards the plaintiffs brought this action to recover the possession of the said sheep and horses, under ch. 2, title 7, part 2 of the Code (§ 206 to 217, inclusive), in pursuance of which, they obtained possession of the same. After the time for answering the complaint had expired, and no answer having been received, the plaintiffs obtained an order of reference to Isaac Q. Leake, Esq. to report the plaintiffs' damages for the taking and

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detention of the property. This order of reference was made upon notice, and upon the appearance of both parties by their counsel, at a special term held in Chemung county in February 1851. The defendant appealed from the order of reference to the general term, within the thirty days allowed by the Code for that purpose, by giving notice of such appeal, but without giving any undertaking as required by § 348, or any other section of the Code. The plaintiffs disregarded the appeal and proceeded to execute the order of reference, and obtained a report from the referee of \$345.55, for the detention of the property in question.

The defendant now moves to set aside the report of the referee and all subsequent proceedings.

JAMES DUNN, *for Defendant.*

WM. H. GIBBS, *for Plaintiff.*

WELLES, Justice.—There were several questions discussed upon the argument of this motion, none of which in my judgment, are worthy of consideration, excepting the one which involves the validity of the appeal from the order of reference, as a stay of the plaintiffs' proceedings.

It is objected by the plaintiffs' counsel that the order is not appealable, and that if it is, the appeal in this case was imperfect and inoperative as a stay of proceedings, for the reason that no undertaking, as required by § 348, has been executed.

The appeal is from an order as distinguished from a judgment entered upon the direction of a single judge, as provided in § 348, where an undertaking is necessary.

Section 349 provides for appeals from orders made by a single judge, and defines the cases in which they may be brought. This section declares that "an appeal may *in like manner*, and within the same time, be taken from an order made by a single judge of the same court, and may thereupon be reviewed in the following cases," &c. It is contended that the words "*in like manner*," mean in this connection, the same as if the expression had been in the same form and with the like proceedings;" in other words, that they enjoin or require the same steps and proceedings to be taken

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by the appellant in order to perfect the appeal, as are required by the previous section, 348, on an appeal taken from a judgment.

I am disposed to hold that no undertaking is necessary in a case like the present, of an appeal from an order made by a single judge. Section 327 directs how an appeal shall be made, which is by the service of a notice in writing, on the adverse party, and on the clerk with whom the judgment or order appealed from, is entered, stating the appeal from the same or some specified part thereof. This provision is in the chapter entitled "of appeals in general." The next chapter is entitled "appeals to the Court of Appeals," and relates exclusively to that class of appeals. The next (ch. 3) to appeals to the Supreme Court from inferior courts. Then comes chapter 4, which provides for and regulates appeals from *judgments* in the Supreme Court, entered upon the direction of a single judge of the same court, and appeals in the same court from *orders* made by a single judge to the general term. In the former, security must be given in the same manner as upon an appeal to the Court of Appeals (§ 348), which is an undertaking on the part of the appellant by at least two sureties, to the effect that the appellant will pay all costs and damages which may be awarded against him on the appeal, not exceeding two hundred and fifty dollars; or that sum must be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal (§ 334). In case of the latter, it is provided that "an appeal may *in like manner*, and within the same time, be taken from an order, &c. The words "in like manner," I think, are satisfied by referring them to the directions contained in § 327, prescribing how appeals are to be brought generally, as before stated. That is to say, an appeal from an order may be taken by the service of a notice in writing on the adverse party, and on the clerk with whom the judgment or order appealed from is entered, stating the appeal from the same, or some specified part thereof, in the same manner as other appeals are brought. The section giving these appeals does not in terms require security to be given by the appellant, and as the only words in the section, or elsewhere in the Code, which seem to

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look towards such requirement, may have a different application, I incline to think it was not the intention of the law makers to require two sureties in \$250, or a deposit in money to the same amount, in cases where if the order appealed from should be affirmed, the court is limited to ten dollars in awarding costs against the appellant.

The next question is, was this an appealable order. Section 349, before repeatedly referred to, specifies in four subdivisions, the cases where an appeal from an order as distinguished from a judgment, will lie. The second of those subdivisions is, "when it involves the merits of the action, or some part thereof." It is not claimed that the present case comes within either of the other subdivisions. Did the order appealed from in this case involve the merits of the action? The summons and complaint had been served, and the time for answering had expired. How was the plaintiff to get his damages ascertained and liquidated. The 2d subdivision of § 246 answers the question. A portion of that subdivision reads as follows: "and where the action is for the recovery of money only, or of specific, real or personal property with damages for the withholding thereof, the court may issue a writ of inquiry or order the damages to be assessed by a jury; or if the examination of a long account be involved, by a reference as above provided." This section is a part of the chapter providing for judgment upon failure to answer. It seems to me that the order in question did involve some part of the merits of the action, if not directly, certainly indirectly and really. The action was for the recovery of the possession of personal property, with damages for its detention. The plaintiffs had obtained possession of the property, and the order appealed from directed in what manner the damages for the detention should be ascertained. It was an important question whether they should be ascertained by a reference or a writ of inquiry—whether by one man or twelve. If the court at special term ordered the reference without authority of law, and thus illegally determined the means by which the damages should be ascertained, unless an appeal can be taken from the order, it seems to me the defendant is without



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remedy, and upon a point involving all that remains of the merits of the action. I am constrained to think that this was an order involving the merits of the action, from which an appeal would lie, and that the plaintiffs were not at liberty to disregard it.

The only remaining question is whether such an appeal operates as a stay of the plaintiffs' proceedings in the action under the order appealed from. The Code nowhere declares an appeal in any case a stay of proceedings, not even in cases where security is required. In several cases it provides that the appeal shall not stay the proceedings unless certain undertakings are given, clearly assuming, I think, that the appeal does so operate, whenever the required security is given in those cases where it is required, and that it equally suspends proceedings upon the order appealed from, in those cases where security is not required. The review by appeal is substituted for a writ of error in the cases where formerly a writ of error would lie, and by the common law a writ of error suspended the proceedings upon the judgment upon which it was brought, in all cases. I think the intention of the legislature was that an appeal should in all cases have the same effect upon the judgment or order appealed from, excepting where otherwise provided.

If the foregoing views are correct, it follows that the plaintiff was irregular in proceeding under the order of reference after the appeal was brought, and that all such proceedings should be set aside, but without costs. Ordered accordingly.

Moule agt. Macedon and Bristol Plank Road Co.

ONTARIO COUNTY COURT.

Special Proceeding by CORNELIUS F. MOULE, Petitioner agt. THE  
MACEDON AND BRISTOL PLANK ROAD Co. Respondents.

A toll gate and gate house of a plank or turnpike road company may be removed under the act of April 9th, 1851, by a county judge, if erected and put up within ten rods of the front of any dwelling house, barn or out house, without the written consent of the owner, where *located* after the act took effect.

The act was passed the 9th of April 1851, and took effect twenty days from its passage, on the 29th of April 1851. And where a Plank Road Company, on the 14th of April 1851, staked out their ground, dug a cellar and got together materials for building a toll gate and gate house within the limits prohibited by the act, without the written consent of the owner. *Held*, that they had not thereby *located* their buildings before the act took effect. The term "*located*" was synonymous with "erect and put up," within the meaning of the act.

S. DRAPER JR., *for Petitioner.*

GEO. WILSON, 2D, *for Respondent.*

MARK H. SIBLEY, County Judge.—The petitioner complains that the respondents have since the first day of May last, erected and put up, upon the highway along which their road runs, "a toll gate and a gate house," within a less distance than ten rods from the front of his dwelling house, without his written consent, and prays an order of removal pursuant to § 2 of ch. 109, pp. 193–4 of the Statute Laws of 1851.

The respondents' answer alleges that those structures were *located* in pursuance of a resolution of the board of directors of the company, by actually staking out the position of the same upon the land, *on the 14th day of April* 1851, digging a cellar and collecting a large portion of the materials for a gate house thereon, *previous to the 29th day of that month*; and that such location was made with the verbal consent of the petitioner.

The facts established by the proofs in the case, to my satisfaction, are, that the toll gate and gate house are erected at the point designated by the resolution of the board of directors, and within *six* rods of the front of the petitioner's dwelling house; that the ground on which the structures stand, was designated and staked

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out for their erection thereon, by the duly authorized agents of the respondents, *on the 14th day of April 1851*; that a cellar for the gate house was dug and a portion of the materials for erecting the house collected, on the premises so designated, *previous to the 29th day of that month*; that the residue of the work of constructing and erecting the said gate and house was performed after that time, and that no *written* consent has been obtained from the petitioner to such location, or erection.

Upon these facts the legal question arises, whether I have jurisdiction of this matter under the 2d section of the act *passed on the 9th day of April, 1851*, entitled "*an act in relation to plank roads and turnpike roads*, and whether the petitioner is entitled to an order to remove the toll gate and gate house?

No time being specified in the act for its going into operation, its provisions do not take effect until twenty days after its passage. The 2d section is in the following words: "It shall not at any time hereafter be lawful for any plank road company, formed under the said act of May 7th, 1847, or for any turnpike company to put up or erect any toll gate, gate house or other building, within a less distance than ten rods from the front of any dwelling house, barn, or other out house, without the written consent of the owner thereof; and if any toll gate or other such building *shall hereafter be located* by any such company within said distance, without such consent, the county judge of the county in which such building *shall be so located*, shall on application, *order the same* to be removed.

The case turns upon the construction to be given to the phrase "*shall hereafter be located*," as used in this section of the statute. If, as is insisted by the respondents' counsel, their acts of staking out and digging a cellar and collecting materials upon the premises, previous to the act's taking effect, *located* the toll gate and gate house within the fair intent and meaning of the act, then the location preceded the operation of the act, and I have no jurisdiction over the matter.

In common parlance the word *located* would describe the acts done by the respondents previous to the 29th April, in reference

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to the structures; but *locate*, or *located*, are words whose meaning depends upon the connection in which they are used and the subjects to which they are applied. *Locate*, as defined by the great American lexicographer, is 1st, "*to place, to set in a particular spot or position.*" 2d, *to select, to survey and settle the bounds of a particular tract of land.* 3d, *to designate and determine the place of—as a committee was appointed to locate a church or a court house.*" "*Located*," by the same authority, is "*placed, situated, fixed in place.*"

The subjects to which this word *located* is applied in the act are the "toll gate and gate house." Were these "*placed, situated, or fixed in a place*" before the 29th of April? If not, then they have been *located* since the act took effect.

If we do not find in the strict meaning of the word any thing to control the construction, we must look into other parts of the law and ascertain the sense intended by the legislature. The design of the section under consideration was to prohibit the doing of an act injurious to the citizen, and to provide a remedy in case the thing forbidden is done. The *prohibition* is that the company shall not "*erect or put up any toll gate, gate house, or other building,*" within ten rods of the front of any dwelling house, &c. without the written consent of the owner, after the act of the 9th of April took effect.

The *remedy* intended to be given for any violation of this prohibition is an order for the removal of the unlawful structures.

The judge is expressly commanded by the statute to order the removal of the building, &c. which shall be located by the company within the prescribed distance after the statute takes effect. "*If any toll gate or other such building, shall hereafter be located by any such company within said distance, without such consent, the county judge of the county in which such building shall be so located, shall on application order the same to be removed.*"

If, as is contended by the respondents' counsel, the word *located* as used in the statute, means simply a designation, and fixing upon the spot for a building, or even the digging of a cellar for one, then there would be nothing upon which the order could operate, for neither the site or cellar could be removed.



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The subjects against which the order is to run, are the structures, or erections upon the land, and if these are *located, placed, situated or fixed in place*, after the act took effect, it is the duty of the judge to remove them.

Besides, this is obviously a remedial statute, and must be liberally interpreted for the prevention of the evils at which it is aimed, and for the redressing of the wrongs thereby prohibited. The *wrong*, as I have before remarked, is to "erect or put up" the structures named within an inconvenient or injurious distance of other buildings. And whether I look at the definition of the word "*located*," the subjects to which it is applied in the act, the connections in which it stands, or the whole scope and purpose of the section, I am constrained to say that upon reasonable and sound construction, the word *located* was employed by the legislature in reference to, and synonymously with, the antecedent words "*erect, or put up*," and such is its legal import as it stands in the statute, as the toll gate and gate house in question were "*located, erected or put up*," since the 29th of April last, it is my duty to grant an order for their removal.

Nothing appeared before me at the hearing to induce a doubt that the proceedings of the officers of the company have been conducted in good faith, and under the supposition that they were acting upon their rights, with the implied, if not express verbal assent of the petitioner. But it is quite clear that even according to their own construction of the act, they offended against its *spirit* in *erecting* the building after the legislative prohibition; and the structures having been erected and put up after the act went into operation, I do not see how they can be maintained there against other legal proceedings for their removal, even if the location preceded the operation of the statute. But in my judgment, the case is clearly within the remedial provisions of the second section of the statute.

An order must, therefore, issue for the removal of the toll gate and gate house to a distance of at least ten rods from the front of the petitioner's house, and the respondents must pay the costs of the proceedings.

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Vermilye and others agt. Seldon.

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## SUPERIOR COURT.

VERMILYE AND OTHERS agt. SELDON.

Where the Court of Appeals remit their judgment and proceedings to the court below to be executed, and the court below become legally possessed of the case, it has no power or discretion to grant an order remitting back such judgment and proceedings to the Court of Appeals (for correction) without the assent or direction of the latter court. by resolution or order.

(*This seems to be adverse to the decision in Murray vs. Blatchford*, 2 Wend. 221.)

*General Term, January 1851. Before DUER, MASON and CAMPBELL, Justices.*

By the Court, DUER, Justice.—In this case a decree has been made in the Court of Appeals, settling definitely the rights of the parties, but requiring in the execution of its details that further proceedings shall be had in this court, and in order that these proceedings may be had the cause has been remanded to us, and the remittitur having been filed, our exclusive jurisdiction over the case has been restored.

Under these circumstances an application has been made to us on the part of the defendant for an order directing the clerk to take the remittitur from the files of the court, and the effect of granting the application it is admitted will be that the execution in this court of the decree of the appellate court will be indefinitely suspended. Our jurisdiction over the cause will cease entirely, and that of the Court of Appeals, in all its extent, be restored. The object is avowed to be to enable that court when it shall have become repossessed of the cause to reform its present decree by the correction of certain grave errors, which greatly to the prejudice of the defendant, it is alleged, have intervened. We are asked therefore, under the form of an order upon the clerk, to remand the cause to the court of ultimate jurisdiction in order that it may have the power of reversing or modifying and amending its own former proceedings.

We deem it unnecessary to state the special grounds upon which a motion so unusual has been rested, since we are satisfied

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Vermilye and others agt. Seldon.

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that without the express assent of the Court of Appeals we have no power to grant it, nor upon the papers before us ought we to have listened to the application. The granting or denying of every motion which as a court we have the right to entertain, rests entirely in our own discretion. It is true this discretion is not arbitrary but judicial; but it is equally so that it is absolute in its exercise and final in its result. There is no other tribunal that can review our decisions in these cases nor even enquire into the reasons upon which they are founded, and unless we revoke or modify them ourselves, whatever injustice may be done, the parties who suffer are without redress. We find it impossible to believe that we have such a discretion in relation to the question now before us. We can not believe that we have an election to put an end to the jurisdiction that we have been enjoined to exercise, and to obey or disobey the lawful mandates of the superior tribunal. We can not assent to a doctrine that strips the court of supreme and ultimate jurisdiction of its most essential attributes and necessary powers; that divests it of any authority to enforce obedience to its own decrees, by leaving their execution to depend upon the mere discretion, the will and pleasure of the subordinate courts to which they are directed. Yet it is in reality to this doctrine that our assent is required, if the consequences of taking the remittitur from the files of the court are such as have been asserted. If we have the power to grant the motion in this case, we have in all. If the power may be exercised now, its exercise may be repeated as often as the defendant may choose to make a similar application, and we for any reasons be disposed to grant it. The Court of Appeals as often as it pleases may order the remittitur to be filed, but we by ordering it to be removed, *whenever we please*, may render the direction a nullity. Such is not or construction of the powers of the Superior Court and of our duties as a subordinate. The Court of Appeals has ordered the remittitur to be filed in order that its decree may be executed; and it has, therefore, by a necessary implication, ordered that it shall remain on file so long as the execution of the decree may require. The duty of executing the decree it has

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imposed upon us, and from the performance of this duty, by no act of our own, can we be released. To grant the present motion would, in our judgment, be an act of positive disobedience to an authority that we are bound to obey, and a reversal, not indeed in terms, but in effect, of a decree that we are bound to accept and enforce.

It has been said that by suspending the execution of the decree in the present case, we shall violate no duty and incur no responsibility, since we have sufficient evidence that the Court of Appeals desires to reexamine, and if necessary amend its own proceedings; and to enable it to do so, it is desirous that the application that has been made to us shall be granted; but we are very clearly of opinion that there is no evidence of these facts now before us upon which as judges, we could be justified in acting. The question as to the wishes and intentions of the Court of Appeals is not to be determined upon affidavits. It does not depend upon the opinions, declarations or acts of its individual members. It is only by some act of the court, *as such*, that the wishes of the court can be manifested, and to enable us to comply with its wishes, proper evidence of the necessary act must be furnished to us. A resolution of the court entered upon its minutes would seem to be the necessary act, and a copy of the resolution certified by the clerk would furnish to us the requisite proof; nor, perhaps, is it necessary that there should be any direct communication from the Court of Appeals to this court. The clerk of this court has not filed the remittitur under any order made by us. He has acted in direct obedience to the decree of the Court of Appeals, and if by the true construction of that decree he is bound to retain the remittitur upon file, he is still the immediate ministerial agent of that court, and in the discharge of his duties as such must be subject to its immediate orders. At any rate an order from the Court of Appeals directing the clerk to take the remittitur from the files and redeliver it to the solicitor of the plaintiff, we doubt not would be promptly obeyed, nor, if necessary, would our aid be wanting to enforce obedience.

So far as has been discovered, *Murray vs. Blatchford* (2 *Wend.*



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221), is the only case to be found in the reports in which an application like the present has been granted or made. In that case the remittitur was taken from the files by order of the Chancellor and for the purpose, it would seem, of enabling the Court of Errors to remodel and reform its own decree. But it does not appear from the report, that the motion was resisted before the chancellor, and we think it is to be inferred that it was granted chiefly upon the ground that the remittitur was improperly or prematurely filed. Even had this precedent been as direct and positive, as it seems to have been considered, our conviction as to our powers and duties are too clear to have been yielded to its authority. To require us, without any request from the Court of Appeals to send back to that court in its own decree in order that the errors which it is alleged to involve may be there corrected, is to require us to hold to the highest tribunal in the state this extraordinary language: "You have reversed our decree, but the decree which you have sent to us we shall not execute, for we are satisfied that it has been made by you without due deliberation. We have looked into it, and must say that upon its face its errors are manifest and grave; these errors it will be your duty to correct; to enable you to perform that duty, we send you back your decree." What reply the Court of Appeals might deem it advisable to make to the strange insult upon its authority that our proceedings would imply, we know not, but that it might justly draw upon us its severest animadversion and rebuke, we do not at all doubt. So long, however, as we retain any respect for that high tribunal, or for ourselves, by no act of ours shall such an animadversion be provoked or justified.

The motion of the defendants is denied, but without costs. The case of *Murray vs. Blatchford* is a sufficient precedent to justify the application.

It is proper to add that all the judges of this court having been consulted, this decision is to be regarded as their unanimous judgment.

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Barber agt. Crossett.

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## SUPREME COURT.

BARBER agt. CROSSETT.

A public officer, sued as such, is entitled to double costs where he succeeds in the action.—HAND, Justice.

(There are adverse and corresponding decisions upon this question in 4 and 5 Howard's Pr. Reports.)

*Warren Special Term, August 1850. Double costs.* The defendant was sued for personal property, and justified as constable under an execution, and had a verdict.

O. FERRIS, *Moved for double costs.*

L. H. BALDWIN, *Contra.*

HAND, Justice.—It is contended that the Code has repealed the statute giving additional costs to a defendant when sued as an officer (*Code*, § 303-4; 2 R. S. 617, § 24). On this point different members of this court entertain different opinions. Mr. Justice PARKER has held that this provision is repealed. (*Hallenbeck vs. Miller* 4 *How. Pr. R.* 239). Mr. Justice SILL, in *Murray vs. Haskins* (*id.* 263), and Mr. Justice WELLES, in *Chadwick vs. Brother* (*id.* 283), held that it was not. In the case of *Taylor vs. Crawley*, decided in February last, I examined this question and came to the conclusion that the officer was still entitled to double costs. The language of the Code is not that all statutes in relation to costs are repealed. It was the intention of the legislature to abolish the fee bill as between attorney and client. And they go further, and repeal "all existing rules and provisions of law restricting or controlling the right of a party to agree with" his lawyer "for his compensation," and leave the measure of that to the agreement of the parties.

If this strips the courts of all control over the subject, which I doubt, and upon consideration shall be found as to the profession to license champerty, and leave an open field for the encouragement of barratry, it is to be hoped that the bar of this state will, in countenance and conduct, and by common consent, maintain the high position heretofore held by them and frown

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upon every thing dishonorable, whether legally punishable or not. To the fair minded lawyer, nothing can be more repulsive than the quack system of "no cure, no pay;" particularly when the pay is to be a division of the spoils! All experience has shown that justice is better administered when suits are conducted by those not parties to the controversy.

But this statute, as I have already stated in terms applies only to the compensation between attorney and client. It wipes away the old fee bill between them, and then adds, "but there may be allowed to the prevailing party upon the judgment, certain sums by way of indemnity for his expenses in the action, which allowances are in this act termed costs." The former statute gave to the defendant, sued officially, "the amount of his taxed costs, and one half thereof in addition." Technically the costs are not now *taxed*. But they are so, virtually, by the clerk; and the object of the statute was to give to the officer, who is bound to proceed at his peril in the execution of his duty, this extra allowance for his own indemnity and protection.

If the Code can be considered a revision of the statutes in relation to costs, except where otherwise declared, then those parts of that title of the Revised Statutes "of cases in which costs may be recovered, and in which double costs may be allowed," which are omitted, may be considered as impliedly repealed (cases cited in *Smith on Con. of Stat. &c.* 904, § 787). But it does not profess to do so, nor to repeal all laws in relation to costs. The repealing part of § 303, "all statutes establishing or regulating the costs or fees of attorneys," &c. does not, as we have seen, in terms certainly, repeal all statutes establishing or regulating costs between party and party; although the last clause of that section uses language apparently establishing costs *de novo*; and by § 311 the clerk is to insert in the entry of judgment "the sum of the charges for costs as above provided," &c. But double costs under the old system, it would seem, were properly allowed only upon special application (4 *Wend.* 216; *Gra Pr.* 591). If the statute giving double costs to officers, is not repugnant to the provisions of the Code, it is not repealed. One statute does not

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repeal another by implication, if both may well subsist together (Bowen vs. Lease, 5 *Hill*, 226, and cases there cited. Williams vs. Potter, 2 *Barb. S. C. R.* 316). The Revised Statutes, by express provisions, give double costs to officers in certain cases, and the Code is silent upon the subject. It seems to me that the above rule applies. The motion must be granted.

Motion granted.

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### SUPREME COURT.

MOORE Executor &c. agt. THAYER Public Administrator, &c.  
Administrator of DUNCAN McEWING.

The *service* of a summons by publication is not effected until the expiration of the time for publication.

By § 127 of the Code, civil actions are commenced "by the service of a summons." But where an attachment has been issued, and no summons served, the court, by §139, have jurisdiction and control of the proceedings for the purpose of reviving and continuing the action in the name of the representative of a deceased party.

*New York General Term, Dec. 1850.*—EDMONDS, EDWARDS, and MITCHELL, *Justices*. This was a case where an attachment had been issued against the property of the defendant McEwing, and his property taken under it. Before the expiration of the time prescribed by the order for publication of the service of summons against McEwing, he died, to wit, on the 4th of July 1850. And on the 29th of July 1850, an order was granted, *ex parte*, at special term, on application of the plaintiff, reviving the action in the name of the public administrator. On the 26th October 1850, this order of revival was set aside by the special term, on application of the defendant. From this last order an appeal was taken to the general term.

McCANN & MONCRIEF, *for Plaintiff*.

WM. G. STERLING, *for Defendant*.

By the Court, EDWARDS, Justice.—The ground upon which this motion was decided at the special term was, that the summons



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had not been served at the time of the decease of the defendant Duncan McEwing, Jr. We concur in the opinion which was expressed upon the decision of the motion, that, as a general rule, a suit is not commenced where the service of the summons is by publication, until the expiration of the time for publication prescribed by the Code. But in addition to the provision contained in § 127 of the Code, as to the commencement of civil actions, it is also provided in § 139, that from the time of the allowance of a provisional remedy in a civil action, the court shall be deemed to have acquired jurisdiction, and to have control of all subsequent proceedings.

In this case an attachment, which is one of the provisional remedies mentioned in the Code, had been issued against the property of the defendant McEwing, and his property had been taken under it before his decease. It seems, then, that although there had not been a service of the summons within the meaning of the Code, still the plaintiff had acquired a provisional lien upon the defendant's property, which would become complete, to the amount of his judgment, provided he recovered a judgment in the action.

We think that this was a right which should be preserved, and which the Code, in the section above cited, intended to preserve; and although the summons had not been served, still the court had acquired sufficient jurisdiction to enable it to put the suit in such a condition that the plaintiff could enforce his provisional lien; and it has sufficient control of the action to substitute the personal representative of the deceased in his place, as a party defendant, in order that the summons may be duly served.

We think that the order made at the special term should be reversed, but without costs. (*a*)

(*a*) EDMONDS, Justice, did not hear this argument and took no part in the decision.

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Wilson agt. Wheeler.

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## SUPREME COURT.

WILSON agt. WHEELER.

After issue joined in an action to recover the possession of personal property, and a stipulation to try, the plaintiff again neglected to bring the cause to trial, but entered a rule to discontinue and tendered the costs.

*Held*, that the defendant could not move for the dismissal of the complaint and a judgment for a return, &c. His remedy, since the Code, is to notice the cause for trial and then take such judgment as the case may require.

The plaintiff in such action, where the property has been delivered to him, and after issue upon a plea or answer entitling the defendant to a return, &c. can not discontinue the suit by an entry of a rule and payment of costs.

Though as a general rule, the plaintiff may discontinue as a matter of course (on payment of costs), at any time before verdict, writ of inquiry, or rule for judgment.

*It seems*, that where the property has been delivered to the plaintiff and he does not succeed, and the defendant is in no default in pleading or otherwise, and the suit is not abated by the act of God, the defendant is entitled to a judgment for a return of the property or for its value.

*It seems*, that after issue joined, if the defendant wishes for more than a dismissal of the complaint with costs, under the Code he must notice the cause for trial.

*St. Lawrence Special Term, February 1851.*

C. ANTHONY, for defendant moved for judgment of dismissal of the complaint, and for judgment for the value of the property, and for a reference or writ of inquiry to ascertain the value. The action was to recover the possession of personal property, consisting of a quantity of furniture, which had been taken from the defendant and delivered to the plaintiff by an affidavit and endorsement thereon, pursuant to § 208 of the Code. He read an affidavit, showing that the plaintiff had before neglected to bring the cause to trial, and had stipulated to do so, but again had neglected to do so, and that the property had been delivered to the plaintiff and used by him in a tavern until some of it had been destroyed. He insisted that he was entitled to a judgment for a return or the value of the property and damages for taking.

C. G. MYERS, showed by affidavits that the plaintiff had, before notice of this motion, given notice of a rule to discontinue and offered to pay the costs.

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HAND, Justice.—The question is, whether in an action of replevin, or, as it is now called, to recover the possession of personal property, the plaintiff can discontinue, upon payment of the costs merely, where the property has been delivered to the plaintiff, and the defendant has put in an answer entitling him to a return. The defendant insists that he has a right to a judgment for a return of the property, or the value of it, as he shall elect, notwithstanding the attempt of the plaintiff to discontinue.

There are some old cases that seem to be against the plaintiff. In one, it was said, that in replevin, the plaintiff can not discontinue without the privity of the court (*Bear vs. Underwood, Leon.* 105); and in another, the right to discontinue with leave, seems to have been doubted; for after joinder in demurrer, plaintiff obtained a rule for the avowant to show cause why he should not discontinue upon payment of costs; and it was objected that a discontinuance in replevin is very different from a *non pros*, and that after a discontinuance, a writ *de retorno habendo* could not be awarded. The matter, however, was afterwards disposed of by consent of parties (*Barnes*, 171; 2 *Sell. Pr.* 166). And where the suit abated, a return was adjudged, and one reason given was, that otherwise the defendant would not be placed *in statu quo* (*Salkeld vs. Skelton, Cro. Sac.* 519; *Lill. Pr. Reg.* 161). If the plaintiff fails to reply after the defendant has put in an answer which, if true, entitles him to the property; the defendant may apply for judgment of return, or, I have no doubt may, if he so elects, have the value assessed by a writ for that purpose; as well as his damages (*Code*, § 154).

The provisions of the Code alone, by no means constitute a complete system of practice, and both parties would have a doubtful remedy, were not the former practice in the action of replevin, in force in many respects. By § 470 that action is not exempted from the operations of the Code; but it is not declared that all other statutes upon the subject are repealed; and § 469 preserves the old practice applicable thereto, when not in conflict with the Code. By the former statute, if the defendant obtained judgment by discontinuance or nonsuit, or by default, &c. after a plea

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entitling him to a return, and the property had been delivered to the plaintiff, he might have judgment for a return or for the value, with damages for detention (2 *R. S.* 531, §§ 53, 4, 5). It is said there is no discontinuance until it is entered on the roll, for a record can not be discontinued but by matter of record (1 *Lee's Dic.* 490). And Gaselee, J. in *Fanshawe vs. Heard* (1 *M. & P.* 191), said it had been so ruled at *nisi prius* (and see *Brand vs. Peacock*, 1 *B. & C.* 649). It has also been said that it could not be entered without the consent of the court (1 *Lee's Dic.* 491). But, as a general rule, the plaintiff may discontinue as a matter of course, upon payment of costs, at any time before verdict, writ of inquiry, or rule for judgment (2 *Sell. Pr.* 335; *Gra. Pr.* 493; 2 *Tidd's Pr.* 628; 1 *Burr. Pr.* 199, 383; *Tidd's Forms*, 122; *Impey*, 486). But I have found no case where the defendant has been allowed to enter up interlocutory judgment and have a writ of inquiry, after the plaintiff had so voluntarily discontinued. Perhaps he may, on the rule being entered without payment of costs, enter up judgment for costs (2 *R. S.* 615, § 16; *James vs. Delavan*, 7 *Wend.* 511); and enter the discontinuance upon the roll (*Brandt v. Peacock, supra*). Though C. J. Savage said, in *James v. Delavan, supra*, that on payment of costs the discontinuance was complete. And I am inclined to think that the statute (2 *R. S.* 531, § 53, 4, 5,) applies to those cases where the defendant takes judgment of discontinuance, as of process, &c., and not where the plaintiff enters the rule. The latter is the plaintiff's act (1 *Saund. R.* 230, A. N. L., 195, c. n. i. *Webb vs. Hill, M. & M.* 253; *Nicholson vs. Cogshill*, 4 *B. & C.* 21). A *non pros.* or involuntary discontinuance, or judgment on a plea in abatement, is a different thing (*Condren vs. Pease*, 10 *Wend.* 333; *McFarland vs. McNitt*, 10 *Wend.* 329; *Ex parte Fort*, 6 *Cow.* 43; *S. C. id.* 439; *Wilkinson on Rep.* 71; *Small vs. Walgrave, Comyn R.* 122). It would be unreasonable to allow the plaintiff to discontinue merely upon payment of costs, where he obtains from the defendant, possession of personal property, *pendente lite*, by the forms of law. The old cases under the English statutes evidently favored a return (*Salkild vs. Skelton, supra*;



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Moore vs. Watts, 2 *Salk.* 581; Anon. *Skinner*, 594; 1 *Saund. R.* 195, *e. d.*; 2 *id.* 286. And see Long vs. Buckerridge, 1 *Str.* 106, 112.)

It is unnecessary to inquire whether, under the Code, the defendant has a remedy upon the undertaking without an execution returned unsatisfied; for I now think of no case in which the defendant is not entitled to a judgment for a return or for the value, where the plaintiff does not succeed, and the defendant is in no default, in pleading or otherwise; nor the suit abated by the act of God. Possibly, the defendant may maintain a suit upon the undertaking without judgment, as the phraseology is not precisely the same in the Code, as it is in the Revised Statutes (2 *R. S.* 524, § 7; 533, §§ 64, 5; *Code*, § 209; Cowden vs. Pease, 10 *Wend.* 333; Cowden vs. Stanton, 12 *Wend.* 120; Burckle vs. Luce, 1 *Comst.* 123; 3 *id.* 47; Gould vs. Warner, 3 *Wend.* 54; Webber's Ex'rs vs. Underhill, 19 *Wend.* 447; Axford vs. Perrett, 4 *Bing.* 586; Perreau vs. Beacon, 5 *B. & C.* 284; Harrison vs. Wardell, 5 *B. & Adolph.* 146); though it is not necessary to decide that point now. So too, if the defendant had ratified this discontinuance, I think he could have taken the property, peaceably, or brought suit for it (Burckle vs. Luce, 6 *Hill*, 558; Yates vs. Fassett, 5 *Denio*, 33, and cases there cited; Morris v. Dewitt, 5 *Wend.* 71). But I see no reason why he should not have a perfect remedy in this suit.

But, notwithstanding the plaintiff may not discontinue, I have come to the conclusion that the defendant has mistaken his remedy. In the case of Cusson vs. Whalon, an action for a trespass, on a motion argued since this case and just decided by me, I came to the conclusion that this court has given a construction to the Code (§ 274) by rule 23; and that the defendant may move for a dismissal of the complaint for not going to trial, and have a judgment for his costs. But I also thought, that if he desired other relief—for something more than the dismissal of the suit—he must notice the cause for trial. The rule, and § 274, authorize the court to dismiss the complaint with costs. But where the defendant notices the cause, he may have a dismissal, verdict, or

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judgment as the case may require (*Code*, § 258, *Contra*, *Mann vs. Lovejoy*, *Ryan & Mood*. 355). This may be a narrow view of the practice, and I have no doubt judgment for a return may be given on a dismissal for not serving the complaint, (§ 130, 274; *Littlefield vs. Murrin*, 4 *How*. 306; *Colvin vs. Bragden*, 5 *id.* 124), or for want of a reply, &c. (§ 154). But where the cause, as here, is at issue, and the Code points out convenient practice; and besides, is not very full in prescribing modes of obtaining judgment by the defendant, or in providing for costs upon a writ of inquiry; and doing it at the circuit is as convenient, and perhaps the least expensive; it is better that the defendant should notice the cause for trial and take judgment there. If the suggestion that on the plaintiff entering a rule to discontinue, the defendant could not affirm it and enter up judgment for a return under the former practice be erroneous, still, I think, after issue joined, under the Code, the defendant had better go to the circuit. The Code seems to indicate that course.

However, I shall not give the plaintiff costs of this motion. Both parties have mistaken the practice, which, in some respects, is now so obscure that it would be unjust to impose costs until it becomes more settled. Motion denied.

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## SUPREME COURT.

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The wife can not sue her husband without appearing by a next friend, except in the single case of an action for an absolute divorce (*see* 4 *How. Pr. R* 232). The Code says (§114) that a married woman may sue "alone." But this is an exception to the general rule, expressed in the same section; that is when she is a party, her husband *must* be *joined* with her. The term "alone" is used there merely in contrast with union with another.

*New York General Term, May 1850—Before EDMONDS, Presiding Justice, and EDWARDS and MITCHELL, Justices.* The plaintiff filed her complaint against her husband, the defendant, in order to reach certain real estate held by him, and which she

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alleged to be her separate property. Judgment had been obtained against her at the circuit, and on a motion by her at special term to open that judgment, it had been objected that she had not appeared and prosecuted by her next friend.

At the special term, before EDMONDS, J., it had been held that the objection was fatal, and that a wife could not sue her husband, without appearing by her next friend, or suing *in forma pauperis*, except in the single instance of an action for a divorce. (See 4 *Howard's Practice Reports*, 232.)

There was an appeal to the general term.

By the Court, MITCHELL, Justice.—The papers produced on the appeal do not show all the facts stated and admitted by counsel. In August 1848 the plaintiff filed her complaint against the defendant, her husband, alleging that she owned in fee certain lands; that her husband was tenant by the curtesy in those lands, and as such received the rents; but that he neglected to pay the taxes, and that there was danger that the lands would be sold for the taxes and the plaintiff's reversionary interest thus be injured. The cause was several times noticed for trial; at two different circuits it was called and the complaint dismissed, the plaintiff being absent: after the last default the plaintiff moved to open the default, but her motion was denied on the ground that she was irregular in not commencing her suits by a next friend.

The action was of an equitable nature; the common law provided no action for a wife against her husband in such case, nor for a reversioner to compel a tenant for life to pay taxes, where there was no contract between them to that effect. If an action on the case would lie in the last case, it could not provide for future neglects as equity could. If a choice, therefore, remains between the two old systems of practice, it would be proper in this case to adopt that of equity.

Another reason why the practice in equity should be preferred is that the Code expressly declares that it is expedient that the present forms of *action* and pleadings in cases at *common law*, should be abolished, but uses no such language as to forms of *actions* and pleadings in equity (see recital at beginning of Code).

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Section 140 only abolishes the forms of pleading heretofore existing, so far as they are inconsistent with the code, and *modifies* the forms of pleading as prescribed by that act. So far, therefore, as the equity form of pleading is not inconsistent with the Code it does not seem to be repealed. Section 469 abrogates the former rules and practice of the courts so far as they are inconsistent with that act; but expressly provides that where they are consistent with that act they shall continue in force, subject to the power of the courts to *relax, modify or alter the same*.

The act of 1813 (2 R. S. 197-201, § 1 and 12) recognized the distinction between bills for a divorce *a vinculo matrimonii*, and bills by the wife for the cruelty of the husband, and in the last case expressly authorized the husband before he should answer the bill, to require security for costs from the complainant. The adjudication of the highest court of the state (in Wood vs. Wood, 8 Wend. 357), and the constant practice of the Court of Chancery before and after that time, show that although the 12th section of the laws of 1813, giving the husband the privilege of requiring from his wife security for costs, was not reenacted in the Revised Statutes, the rule remained the same; and that the wife whenever she prosecuted her husband in chancery was required to do it by her next friend. The cases of infant and non resident plaintiffs were referred to as analogous (see also 3 Paige, 378, Robertson vs. Robertson; *id.* 267, Lawrence vs. Lawrence; 2 *id.* 454, Wood vs. Wood).

If the decision in that case had rested on the power of the chancellor "to establish, alter, amend and modify the practice" (2 R. S. 605, § 46), that power still remains as great as it did before (Code, § 469), the only restriction being that it must not be exercised in opposition to any existing statute.

It is said the language of the Code is as strong in favor of the wife suing without security in all cases as it was under the Revised Statutes in cases of divorce *a vinculo*. But there is a difference in the phraseology. In the case of an absolute divorce it was provided that the bill might be exhibited by the wife *in her own name* (2 R. S. 144, § 39); those words "in her own name"



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were relied on as authorizing the suit without surety (see 8 *Wend.* 367, *Wood vs. Wood*), and the omission of them in other cases as leaving the wife "to the general practice of the court to exhibit her bill by her next friend." The language of the Code is that she may sue "*alone*."

That a lunatic should sue in the name of his committee, an infant in the name of his next friend and a married woman in the name of her next friend are phrases well understood, meaning that the parties in interest should be the plaintiff, but instead of appearing by attorney, he or she should appear in the name of or by his or her next friend. When the statute as to absolute divorces used this well understood phrase, it received a construction from the highest court, according to that understanding.

When the Code says the married woman may sue alone, the authority is given only as an exception to the general requirement established in the same section (114), that when she is a party her husband *must be joined* with her. The last is the general rule, and it then makes two exceptions in which she may sue "alone"—that is, exceptions in which she need not be joined with her husband. This is all that the term "alone" can mean when it is used in contrast with union with another. It leaves the question whether she shall appear in her own name, or by attorney, or by next friend, untouched.

It was said that this construction would require security in cases of *absolute divorce*. But that would not be so. The Revised Statutes, as to divorces, remain unaffected by the Code, and the practice in those cases remains therefore as before.

It is true that the Code (§ 111) provides that every action must be prosecuted *in the name* of the real party in interest. But these words "in the name," as other words, must be understood from the subject with which they are connected, where, and in § 111 they are employed to prohibit suits being brought by or in the name of those who have a mere legal title, and to require those suits to be brought by the one having the real or beneficial interest except in certain specified cases. The subject there treated of was who the real plaintiff should be, not how he should sue.

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That these words were used there in that sense only, appears by the 115th section, requiring an infant to appear by guardian.

A lunatic, or one whose faculties are impaired by age, would be the real party in interest; yet can there be a doubt that he must sue by a next friend, or by his committee: and yet the suit would be said to be, and would be, by him alone, unless some estate had passed to his committee.

It was said that the defendant by answering had waived the objection; and that the objection was substantially, that the plaintiff has not legal capacity to sue; and sections 148 and 144 of the Code were relied on for these positions.

Those sections relate to the subject of pleading, and the rule again applies that the meaning of words must be determined by the subject to which they are applied. When the 148th section allows the defendant to object by demurrer, or answer that the plaintiff has not legal capacity to sue—and that if such objection be not taken in either of those modes, the defendant shall be deemed to have *waived* it; it means that he shall be deemed to have waived it so far as the pleading (the subject treated of) is concerned. If an infant were suing by attorney or in person, so that he could afterwards reverse or appeal a judgment against him, the defendant should be allowed to stay proceedings until the irregularity should be amended, although he might be deemed to have waived the objection by answering, so that he could not raise it at the trial, or by pleading or on appeal.

So, too, if another action were pending between the same parties for the same cause, the omission to plead it would be a waiver of the objection so far as the pleadings were concerned; but the court, to prevent the incongruity of two contrary judgments on the same state of facts, might stay the proceedings in one suit until the other should be decided. So if there were a clear defect of parties, the defect would be waived by not pleading it: but that waiver would not prevent the court from exercising its discretionary power in a proper case and allowing the defendant to amend his pleadings, or staying the judgment until the plaintiff should bring in proper parties. It may be that such a power

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Coit agt. Coit.

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should be exercised cautiously, but still it may be necessary; as, if one legatee claimed the whole fund from an insolvent executor, and it should appear that others were entitled to part of it, the court would not allow the rights of the absent persons to be destroyed by the omission of the executor; and yet it would not allow him to raise the objection by pleading after he had once waived it.

The case of *Wood vs. Wood*, in 8 *Wend.* and other cases show that the objection might before the Code, be raised at any time; and that it is an answer to a motion of the plaintiff for relief.

Here the plaintiff applies to the court for relief, and it is a peculiarly discreet use of the power of the court to refuse the relief, until security shall be given which shall protect the defendant from the unnecessary costs caused by the plaintiff's repeated defaults.

The order below should be affirmed, but may be so modified that the plaintiff's motion to open the default be granted on her paying \$10 costs and amending her complaint, and appearing by a responsible next friend, whose sufficiency shall be approved of by one of the justices of the court on notice to the defendant's attorney.

NOTE.—The opinion delivered by EDMONDS, Justice, at special term, in this case is published in 4 *How. Pr. R.* 232. And the general term, in the foregoing well considered opinion having affirmed that decision, it may now be considered, in the first judicial district at least, as the settled practice. From the Reporter's knowledge of the practice in other districts upon this question, it is believed to be generally the same.

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Lewis agt. Kendall.

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## SUPREME COURT.

LEWIS agt. KENDALL.

An answer to a complaint for slander, in alleging facts and circumstances in justification of the words alleged to have been spoken, is bad on demurrer, where such facts and circumstances alleged do not constitute a criminal offence. Thus, the answer alleged, in substance, that the defendant would prove on the trial, that the plaintiff was in the service of the Syracuse and Utica Rail Road Company as baggage man, or servant, being and running upon the cars from Syracuse to Utica; and that the defendant gave the plaintiff an open, unsealed letter containing \$12 in money addressed to A—— B——, Utica, with a tin can to get some oil for defendant, and gave to plaintiff two shillings for his trouble; that when plaintiff delivered the letter in Utica it was found to contain only \$10; and charged that the plaintiff fraudulently embezzled \$2; and that the words charged to have been spoken in the complaint, if ever spoken, were spoken in reference to said embezzlement, &c.

*Held*, that if the statements of facts as alleged, were proved, it would not constitute the crime of embezzlement, as the plaintiff was not the clerk or servant of the defendant within the meaning of the statute. Nor did the plaintiff receive the money as the officer, agent, clerk or servant of the Rail Road Company, or by virtue of his employment by them, at least, no allegation of that kind being in the answer; the most that could be said of it, was, that the plaintiff acted as the special agent of the defendant; and the facts stated constituted a breach of trust, and nothing more.

Besides, these statements in the answer is bad pleading. The answer first denies that the defendant ever spoke any of the words contained in the complaint, and then says, if, however, the plaintiff prove he did, the defendant will then prove certain things (as stated). It should be certain; and every material and traversable fact should be alleged, and not left to inference. It should be direct and positive.

The defendant, in his answer, should either confess and avoid the action made by the complaint, or should deny or traverse all the material facts in it; and must state facts, not arguments.

*Onondaga Special Term*, 1850. This is an action of slander, and the case comes before the court on a demurrer to the answer. The answer in the first place denies all the material allegations in the complaint. In short, the answer denies the speaking of any of the words in the complaint, and then it says that in case the said plaintiff shall, notwithstanding, prove on the trial of this cause the speaking and publishing of all or any of the words mentioned in the complaint, then, and in that case, the defendant will prove on the trial in justification thereof, the following facts and circumstances, the substance of which is that the plaintiff was in



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Lewis agt. Kendall.

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some capacity in the service of the Utica and Syracuse Rail Road Company, as a baggage man or servant, being and running upon the cars from Syracuse to Utica; and that the defendant gave the plaintiff at Canastota, a small village through which said cars run, an open unsealed letter containing \$12 in money addressed to Wm. C. Butler, Utica, with a tin can to get some oil for defendant. That when plaintiff delivered said letter to said Butler in Utica, it was found to contain only \$10; and plaintiff claimed that there was only \$10 enclosed in the letter; and the answer charges that the plaintiff fraudulently embezzled \$2 of the said \$12; and that the words in the complaint charged to have been spoken by defendant were, if ever spoken, spoken with reference to said embezzlement, &c. The cause was decided at the Onondaga special term, 1850.

D. D. HILLIS, *for Plaintiff.*

T. BARLOW, *for Defendant.*

MASON, Justice.—This cause comes before the court on a demurrer. I propose in the first place to consider whether the matters stated in the answer of the defendant would constitute a defence if they were properly pleaded; or, in other words, whether the converting of two dollars of the twelve thus intrusted to the plaintiff in the manner and under the circumstances stated in the answer of the defendant, constitutes a criminal offence. If it is a criminal offence it is embezzlement, and falls within the 59th section 2 R. S. page 678, which provides, in substance, that if any clerk or servant of any private person shall embezzle or convert to his own use, or take or make way with, or secrete with intent to embezzle or to convert to his own use, without the assent of his master, or employer, any money, goods, &c. belonging to any other person, which shall have come into his possession or under his care by virtue of his employment, he shall upon conviction be punished, &c. The answer sets up, in short, that the plaintiff was in some capacity in the service of the Syracuse and Utica Rail Road Company as a baggage man, or servant, and running or being upon said rail road and cars of said

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Lewis agt. Kendall.

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company from Syracuse to Utica, through the village of Canastota in the town of Lenox, to Utica and back; and he, the said Lewis, so being in such service, the said defendant did before the alleged speaking of the said words, and on or about the 10th day of November, at Canastota aforesaid, deliver to the said Lewis in a written unsealed letter, containing therein \$12 in money in bank bills, to deliver to Wm. C. Butler in the city of Utica, to whom the said letter was addressed, to be applied by said Butler on account of said defendant, for the sale to defendant of camphene gas, and that defendant at the same time delivered to the plaintiff a tin can, to take to said Butler, for the purpose of receiving therein a quantity of camphene gas for said defendant, to be brought back to him on said cars, and that defendant at the time gave plaintiff two shillings for his trouble; and the answer charges the plaintiff with embezzling two dollars of the \$12 thus delivered to him. It appears to me that the statute was not intended to embrace such a case. Our statute is not as broad as the English statute, and seems to me, taking the whole statute together was only intended to apply to persons in the ordinary situation of clerks or servants having a master to whom they are accountable for the discharge of the duties of their situation; and that the casually procuring a person to receive money in a single message and pay it out, or to receive it, will not constitute a case of a servant's receiving such money by virtue of his employment as servant or clerk, and consequently is not within the statute. Roscoe in his *Criminal Ev.* page 399, edition of 1840, says the casually procuring a person to receive a sum of money will not render that person "a person employed for the purpose, or in the capacity of clerk or servant."

In the case of *Rex vs. Freeman* (5 *Carr. & P.* 534, and 24th *Eng. Com. Law*, 444), which was a case where the prisoner had worked for the prosecutor, sometimes as a regular laborer and sometimes as a roadsman, but at the time in question, not being at all in the prosecutor's service, he was sent by the prosecutor to get a check cashed at a banker's, for doing which he was to be paid sixpence. He got the cash and made off. The court

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Lewis agt. Kendall.

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held it no embezzlement, as the prisoner was not the servant of the prosecutor within the meaning of the statute. This case was decided in 1833, and is cited with approbation by Roscoe in his *Criminal Evidence*, page 399. The same doctrine is laid down in *Ray vs. Moe*, C. C. 259; and Barber in his *Criminal Treatise*, lays down the rule in the following language: "Nor is an embezzlement by one who is neither clerk nor servant, or in any way under the control of the person by whom he is in a single instance only requested to receive, money, punishable under this act" (*Bard. Crim. Treat.* 144). I know there are cases in England which hold a contrary doctrine. In one case it was held a man was sufficiently a servant with the English Statute, although he is only occasionally employed when he has nothing else; and there are cases which hold that it is sufficient if he was employed to receive the money he embezzled; although receiving money may not be in his usual employment, and although it was the only instance in which he was so employed (*Rex vs. Spencer*, R. & R. C. C. 299; 2 *Russ. C. & M.* 210, *Rex vs. Hughs*, M. C. C. R. 370. See also 1 *Harr. Digest.* 20 35, and 20 36, and cases there referred to). I am free to confess that I have not been able to satisfy myself, on a careful examination of the English statute, that it embraced such cases, or was ever intended to; and it is a familiar rule that criminal statutes should receive a strict construction.

Our statute, however, has not received so extended a construction, and I trust will not. It was said by Mr. Spencer, who was one of the revisers that framed our statute, that a stage driver entrusted by his employer to carry money from one place to another, was not a servant within the meaning of the statute (*The People vs. Levaron*, 10 *Wend.* 298). The court, however, held such driver to be a servant within the meaning of the statute; and so it was held in the case of *The People vs. Dutton*, that a bar-keeper entrusted to carry a letter to and from the post office, who fraudulently converts to his own use a letter enclosing money, given him to carry to the post office, is guilty of embezzlement under the statute (15 *W. R.* 581).

It will be seen, on looking at the statue under consideration,

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Lewis agt. Kendall.

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that it only embraces the case of a clerk or servant of a private person, while it embraces the case of any officer, agent, clerk or servant of any incorporated company.

Can it be maintained then that Lewis was the servant of the defendant in this instance, within the meaning of this statute? I do not think it can. The answer alleges that he was in some capacity in the service of the Syracuse and Utica Rail Road Company as a baggage man, or servant, being and running upon the cars of said company from Syracuse to Utica, and the most that can be said of the defendant's employment is that he constitutes him his special agent to carry the letter and money to Utica and deliver it to Butler and get some camphene gas in his can and bring it back to him, the defendant, and upon the allegations contained in this answer he continued the servant of the company, and became nothing more than the special agent of the defendant in this transaction; and it seems to me it would be a perversion of language to call him a hired servant of the defendant in such a case. The question arises then, did the plaintiff receive this money as the officer, agent, clerk or servant of the rail road company, and did the money come into his possession, or under his care, by virtue of such employment or office which he held for the said rail road company. I have not been able to discover any averments or allegation in the defendant's answer which would show that it did.

There is nothing in the pleadings showing that the plaintiff's employment as servant for this company was to do errands of this kind, or carry money for individuals in this way. I infer on the contrary, from the pleadings, that such was not his employment by the company. If it was not, then most clearly the case is not within the statute; and it is sufficient for our purpose that such is not alleged to be his employment by the company in the defendant's answer (2 R. S. 678, § 59; 10 Wend. 298; Rex vs. Snowley, 4 Carr. & Payne, 390; 15 Wend. 581; *Common Law*, 436; Rex vs. Hawtin, 7 Carr. & Payne, 281; 32 Eng. *Common Law*, 510; *Russel's Criminal Evidence*, 393 and 394).

Roscoe cites several adjudged cases in illustration of the rule



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above laid down. "Thus" he says, "a servant or a carrier employed to look after goods, but not intrusted with the receipt of money, is not within the statute, for it must be within the course of the servant's employment to receive the money in order to render him liable." I think we have shown that the case in the defendant's answer does not come within the statute, and the answer therefore refers the speaking of the words to a transaction not criminal; constituting in short a breach of trust and nothing more.

The defendant in his answer has denied the speaking of all the words contained in the complaint, and then the answer states as follows: "and the defendant further answering says that in case the said plaintiff shall, notwithstanding, prove upon the trial of this cause the speaking and publishing by the said defendant of all or any of the words mentioned in the said complaint, then and in that case this defendant will prove on said trial in justification thereof, the following facts and circumstances, that is;" and then setting up a justification or statement of facts which we have held if proved, would show nothing more than that the words charged upon the complainant by the defendant, referred to a matter not criminal and consequently were not slanderous. The plaintiff has demurred to this portion of the answer as well as that part which insists on the same statement in the answer in mitigation and reduction of damages; for the reason that, that portion of the answer is not positive, but is made to depend upon a contingency; and also for the reason that the defendant does not allege therein that the plaintiff committed the act which he says he will prove in justification, but merely says he will prove on the trial, &c. Nor does he allege the truth of what he expects to prove; and thirdly, for the reason that the answer does not contain any allegation upon which the plaintiff can take issue; and the same causes of demurrer are assigned to that part of the answer which insists upon the same fact in mitigation or in reduction of damages, and there is also the further cause of demurrer assigned to the answer, to wit: that the defendant alleges no acts to have been committed by the plaintiff which could authorize him to

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Lewis agt. Kendall.

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speak and publish the said words of and concerning him; and also that the answer states conclusions of law instead of facts.

I know that the present code of procedure looks with great liberality upon the pleadings of the parties, and requires the courts to cast broadly the mantle of charity over their defects (*Code*, § 59, *Laws of 1849*, p. 648). The Code, however, contemplates that the pleadings should be framed with some regard to truth (§ 1 *Report of the Commissioners*, p. 153), and the framers of the Code intended that the pleadings of the parties should contain a clear and distinct statement constituting either the cause of action or the defence, and in concise language, and without repetition, and that each statement should be pointed and distinct, that in case it be not answered or replied to on the other side, that it would require no argument to satisfy the judicial mind what was admitted by the omission to answer or reply; or in case of a demurrer, what facts were admitted (see *Code* sections 142, 149, 150, 153, 160 and 168). The courts should require the pleading to be so framed that the facts stated therein will be admitted if they are not answered; and while the 150th section allows the defendant to plead as many defences as he shall have, it requires that each defence be separately stated, and that it refer to the cause of action it is intended to answer, &c.; and the pleadings should contain a statement of the facts constituting the cause of action or defence in ordinary and concise language and without repetition, and so framed that the common mind will know what is intended; and it is not permitted to a party to draw his pleading with a detailed statement of the evidence which establish the facts. If the courts would require the parties to conform their pleadings to these rules, they would not find themselves so often puzzled to know what the issues in the causes were, which they are called upon to try, and I am satisfied the courts will have to enforce these rules with some rigor or the present system of pleadings will never answer the purposes for which it was intended.

The portion of the answer demurred to does not pretend to be a statement of facts.

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Rogers agt. Rathbone.

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The answer has first denied that the defendant ever spoke any of the words contained in the complaint, and then says, if, however, the plaintiff proves he did, the defendant will then prove certain things. The former practice required the plea to be certain (4 *Taunt. R.* 34), and every material and traversable fact must be alleged and not left to inference (7 *John.* 80; *Gra. Pr.* 239); a plea must be direct and positive (*Gra. Pr.* 239).

The system of pleading under the present Code, I have no doubt contemplated that the defendant, in his answer should either confess and avoid the action made by the complaint, or that he should deny or traverse all the material facts contained in the complaint, and he must state facts and not arguments.

This the defendant was required to do in equity, under the former system (*Story's Eq. Pl. p.* 801, § 852). Applying the rules above laid down to the case under consideration, I do not think we can do less than hold the demurrer in this cause to be well taken, and give the plaintiff judgment upon the demurrer, with leave to the defendant to amend his answer on the payment of costs.

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## SUPREME COURT.

ROGERS agt. RATHBONE.

Notice of motion to correct a pleading must be given within twenty days after service of such pleading (*Rule* 43). Hence the affidavit upon which the motion is founded, should show that the pleading was *served* and *when served*.

*Schenectady Special Term, July 1851.*

CADY, Justice.—This was a motion to strike out a part of an answer for irrelevancy, uncertainty, insufficiency and as not tending an issue, &c. The counsel for the defendant objected that the motion ought not to be entertained, because not made upon an affidavit showing that any action was pending; that any answer had been served, or when it was served.

The forty-second rule of court seems to take it for granted that a motion must be made upon a petition duly verified, or by affi-

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Rogers agt. Rathbone.

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avit; and although there may be cases in which an affidavit would not be necessary, this is not such a case.

In the case of *Ripley vs. Burgess*, (2 *Hill*, 360), the motion was founded on the affidavit served and the pleading in the cause. In that case the affidavit stated that a copy plea and notice of special matter had been served on the plaintiff's attorney. That fact was not denied, and the court held that service of a copy of the plea and notice need not be served with the affidavit, and that the court would deem the copy of the plea and notice produced as the ones served. But in the case under consideration, there was no evidence that an answer had been served, or when it was served. As a general rule a party making a motion ought to show every fact necessary to entitle him to have the motion granted.

By the 43d rule of court, the notice of a motion to correct a pleading must be given within twenty days after service of such pleading. How is the court to know whether the motion is made in time, without an affidavit showing when the pleading was served?

It might lead to much unpleasant altercation between counsel, if the time of serving a pleading was to be determined by the contradictory statements of counsel on the argument. Take the case now under consideration. The only copy of the answer produced does not show when it was served, but it appears to have been verified on the 16th day of June 1851, and the notice of motion was served on the 7th of July 1851. These papers do not show that the notice of motion was given in time, and how is that question to be determined without an affidavit? Whenever the time within which notice of motion must be given is limited by a rule of court or statute, the papers on which the motion is made ought to show that the motion is made in time, or an excuse for its not being so made ought to appear upon the moving papers. I am of opinion that in this case there ought to have been an affidavit showing that an answer had been served, and when it was served, and for that reason the motion is denied; but, as the answer shown is defective, the motion is denied without costs and without prejudice.



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Rensselaer and Washington Plank Road Co. agt. Wetsel.

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## SUPREME COURT.

THE RENSSELAER AND WASHINGTON PLANK ROAD Co. agt. WETSEL.

Irrelevant and redundant matter struck out of an answer, because the matter could not in any way be made the subject, or form a part of a material issue in the action. (*See the case for the matter struck out; also see Williams agt. Hayes, 5 How. 470, and Lewis agt. Kendall, ante p. 59.*)

*Albany Special Term, March 1851. Motion to strike out redundant or irrelevant matter.* The complaint alleges that the defendant became a stockholder in the plaintiff's company in the manner prescribed by law, and that the sum of \$950 is due from the defendant upon the stock subscribed by him. The action is brought to recover this amount.

The answer puts in issue the material allegations in the complaint, and then avers that the plaintiff has not in any manner conformed to the articles of association in the location or construction of its road; but has, since the defendant subscribed the articles, varied the route of their road, so that it does not run as it was designated in the articles of association subscribed by the defendant. It is further alleged that the plaintiff had fraudulently diverted and altered the road from its course, as designated in the articles of association, after the defendant had signed those articles with the understanding that the road should be constructed according to the boundaries contained therein.

The answer then proceeds to state that the road had been surveyed and staked out upon the route contemplated by the articles of association, and in consideration of the construction of the road upon that route, the defendant had agreed with the plaintiff to convey to it, gratuitously, the land of the defendant through which the road was to run, containing about  $8\frac{1}{2}$  acres; and that the defendant has, in fact, executed the conveyance, and delivered it to the plaintiff's secretary. The answer then goes on to detail various proceedings which resulted first, in the location of the road, upon the route which the defendant claims to be that designated and intended by the articles of association, and then, the change of the location to another route, not described in the

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Rensselaer and Washington Plank Road Co. agt. Wetsel.

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articles. Various irregularities in these proceedings are stated, and it is charged that the change was effected by fraud. The defendant claims that he has sustained damages, by reason of the change of location to the amount of \$1000, which he claims to have allowed to him in this action, by way of *recoupment*. The plaintiff moves to strike out all that part of the answer which states the matters mentioned in this paragraph, so as to leave the defence to stand upon the denial of the allegations in the bill, and the averment that since the defendant subscribed the articles of association the route of the road had been diverted from the course then designated.

M. L. FILLEY, *for Plaintiff*.

J. PIERSON, *for Defendant*.

HARRIS, Justice.—Whether or not the route of the plaintiff's road has been changed, so as not to conform to the description contained in the articles of association, or whether, if the route has been so changed, it will exonerate the defendant from his liability to pay for the stock subscribed by him, are questions which may fairly be litigated; but with which, upon this motion, I have nothing to do.

As to that part of the answer which is the subject of this motion, I can not, after the most deliberate examination, discover any useful service that it can render the defendant. Conceding that any cause of action which the defendant might have in consequence of the agreement to convey the land required for the road according to its original location, and the actual conveyance in pursuance of such agreement, would be the proper subject of recoupment in this action (which probably is not the case), yet I am wholly at a loss to see how the facts alleged would constitute a cause of action, or entitle the defendant to recover damages of the plaintiff. Those facts would undoubtedly be sufficient to avoid the conveyance of the  $8\frac{1}{2}$  acres of land, if that should be claimed by the defendant. I will not say that those facts do not show the proceedings of the company in changing the route of their road, to be illegal and void; that is a question I need not

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Rensselaer and Washington Plank Road Co. agt. Wetsel.

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consider. But can those proceedings, whether legal or illegal, entitle the defendant to recover damages of the plaintiff? If the plaintiff has not complied with the terms upon which the defendant agreed to take and pay for his stock, it may constitute a defence to an action for enforcing payment, but it furnishes no ground upon which a claim for damages can be predicated.

The motion to strike out redundant or irrelevant matter is analogous to a demurrer, and should, I think, be decided upon the same principles. If the matter can not be made the subject of a material issue, it has no business in the pleading, and ought not to be left there, to embarrass the opposite party and the court (see Williams agt. Hayes, 5 *How.* 470). Mr. Justice HAND has, in Carpenter agt. West (5 *How.* 53), aptly compared this motion to exceptions for impertinence, under the former chancery practice. With a single exception, I think the analogy will hold. That exception has already been noticed in several cases. It is, that, under the chancery practice, matters of evidence might properly be inserted in a pleading, while they are excluded by the theory of pleading adopted in the Code. Any matter which, upon exceptions for impertinence, under the chancery practice, would be struck out as unnecessary and impertinent, should, upon motion, be struck out as redundant or irrelevant. I know of no better test than that I have already mentioned, which is, to inquire whether the matter objected to, can, in any way, be made the subject, or form a part of a material issue in the action. The application of this rule is fatal to the matter embraced in this motion. I am satisfied that it contains nothing, out of which any issue material to the subject matter of the action can be framed. The motion must, therefore, be granted, with costs.

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Stewart and others agt. Bouton and another.

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## SUPREME COURT.

STEWART AND OTHERS agt. BOUTON AND ANOTHER.

Irrelevant and redundant matter struck out of an answer with costs because it did not come within the principle of pleading laid down in Williams agt. Hayes (5 How. 470). (See also the Renss. and Wash. Plank Road Co. agt. Wetzel, ante p. 68; also Lewis agt. Kendall, ante p. 59.)

*Rensselaer Special Term, Feb. 1851. Motion to strike out redundant or irrelevant matter.* The action is brought upon an undertaking executed by the defendants upon an appeal, pursuant to the 334th section of the Code. The appellant was one Beardsley, who had brought an action against the sheriff of Saratoga, to recover the possession of personal property which had been seized by the sheriff under an attachment against a non resident debtor. Beardsley had previously executed a mortgage upon the same property to one Stover, who, at the time the action was brought to recover the possession of the property, executed to the sheriff the undertaking required by the 209th section of the Code. Judgment having been rendered against Beardsley in the original suit, an action was brought against Stover upon his undertaking, in which judgment was also recovered. This judgment was compromised by Stover, and satisfied. The judgment against Beardsley having been appealed, was affirmed, at a general term of the Supreme Court, and from the judgment so affirmed, an appeal was brought to the Court of Appeals, where the judgment was again affirmed. The plaintiffs, who are the assignees of the undertaking, claim to recover in this action, not only the costs upon the appeal, which amount to \$97.47, but also interest upon the judgment affirmed, to the amount limited in the undertaking. The defendants in their answer, among other things, allege, that as sureties on the appeal, they are not liable to pay interest upon the judgment from which the appeal was taken, since no stay of execution was had or obtained; also that they executed the undertaking at the request and upon the indemnity of Stover; and that the property mortgaged to Stover was worth little or nothing



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Stewart and others agt. Bouton and another.

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over and above the amount for which it was mortgaged. These three allegations the plaintiffs ask to have stricken out of the answer.

E. F. BULLARD, *for Plaintiffs.*

A. B. OLIN, *for Defendants.*

HARRIS, Justice.—I feel constrained, under the rule, which I understand now to be well settled, in respect to pleadings under the Code, to grant this motion. Neither allegation involves a material fact, or tenders to the opposite party a material issue. The first is merely a conclusion of law. The defendants may, perhaps, be right in supposing their liability is limited to the costs upon the appeal; but if they are, the question can not be the subject of an issue of fact. It is a conclusion of law which will arise upon the facts in the case. The other allegations present issues wholly immaterial and unnecessary to a proper decision of the case. Whether or not the undertaking was executed at the request and upon the indemnity of Stover, can not affect the liability of the defendants in this action, one way or the other. Nor can it, by possibility be material whether the property in question in the original suit was worth more or less than the mortgage to Stover (see Williams agt. Hayes, and The Rensselaer and Washington Plank Road Company agt. Wetsel, *ante*).

The motion must be granted; and although I am convinced that the irrelevant matter has been inserted in the answer through inadvertence, I feel obliged, in reference to the principles already established, and in view of the necessity of holding the profession to a more strict attention to those principles in framing pleadings, to allow costs upon the motion also.

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Hutchinson agt. Brand.

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## SUPREME COURT.

## HUTCHINSON agt. BRAND.

In an action for escape under a ca. sa. the sheriff can not avail himself of the irregularity that the ca. sa. issued without a fi. fa. having been previously issued and returned *nulla bona*.

A sheriff can not be allowed to allege error either in the judgment or process as an excuse for an escape.

He can not avail himself of any defect or irregularity in the judgment or the ca. sa. which might render them *voidable* on the application of the party.

Unless the process is *void*, upon which the sheriff arrested the prisoner, he is bound to detain him in custody, and is responsible in an action for escape, if he permits him to go at large. The distinction is between void and voidable process.

The power of a Superior Court of general jurisdiction to award process, is in law, presumed.

It is not necessary to state in the writ the cause of action at all, or to show upon its face that it is such an action as would justify the issuing of a ca. sa.

Where the command of the ca sa. was to commit him (the prisoner) to jail, until he shall pay the judgment *according to law*, instead of saying, commit him until he shall pay the judgment "or be discharged" according to law—*held*, that it was not void, because it was amendable.

In an action for escape, the sheriff is liable for the whole judgment, and costs, but not for interest on the judgment.

*Madison Special Term, Feb. 1850.* This is a civil action, and would have been debt before the Code, on the allegations contained in the complaint. The cause was tried before me at the late Madison circuit in December 1849, without a jury. The following facts were established by the evidence to wit: that on the 13th day of March 1849, Holmes Hutchinson recovered a judgment in the Supreme Court against Abram Lathrop for \$67.77, for costs. The record was filed on the 13th day of March aforesaid, and the judgment docketed on the same day. The action was trover for taking and converting a yoke of cattle. On the 26th day of May 1849, the said Hutchinson by his attorney, William E. Lansing, caused a ca. sa. to be issued upon the judgment to the sheriff of the county of Madison; and the same was, on the 28th day of May aforesaid, delivered to Edwin Sherwin, a deputy of the defendant. The defendant at the time being

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sheriff of the county, and also the acting jailer. Sherwin arrested Lathrop upon the ca. sa. and conveyed him to the jail and delivered him to the defendant who refused to receive him because of certain alleged defects in the writ; and the following were the objections stated by defendant at the time.

*First.* Because the writ does not show that the judgment was rendered in an action wherein the defendant might be lawfully imprisoned on the judgment.

*Second.* Because the said writ commands the imprisonment of the defendant until he shall pay the judgment according to law. The defendant upon the trial raised the further objection that the writ did not show that an execution had been issued against the goods and chattels of the defendant; and because of these defects in the writ the defendant claims he had a right to discharge Lathrop from arrest without subjecting himself to an action for an escape. The defendant proved on the trial of the cause that Lathrop had no property at the time liable to execution, and was not able to pay the judgment.

W. E. LANSING, *for Plaintiff.*

T. JENKINS, *for Defendant.*

MASON, Justice.—The execution although in fact issued by the attorney, is supposed to be actually awarded by the court itself on the day of which it is tested, and upon the application of the attorney of the party entitled to it (4 *Man. & Gra.* 136, note "a." 1 *Burr Pr.* 286).

The process then being considered as awarded by the court, and that court being a Superior Court of general jurisdiction, its power to award this process must be presumed till the contrary be shown (*Borden vs. Fitch*, 15 *J. R.* 141; *Mills vs. Martin*, 19 *J. R.* 33; *Adkins vs. Bremer*, 3 *Cow.* 206; *Sutton vs. Edgerton*, 9 *Cow.* 227; *Bloom vs. Burdick*, 1 *Hill*, 130; 5 *Hill*, 285). The intendment of law is that the court had jurisdiction to award this process (see cases above cited).

It has been repeatedly decided in this court that in an action for an escape of a prisoner in execution on a ca. sa. that the

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sheriff can not avail himself of the irregularity that the ca. sa. issued without a fi. fa. having been previously issued and returned *nulla bona* (Hinman vs. Bright, 13 *J. R.* 529). The principle is a familiar one that in an action for an escape, the sheriff can not be allowed to allege error either in the judgment or process, as an excuse for an escape.

He can not avail himself of any defect or irregularity in the judgment or the ca. sa. which might render them voidable on the application of the party (Perry vs. Adams. 2 *Salk.* 674; Reynolds vs. Coof, 3 *Cow.* 267; Cable vs. Cooper, 15 *J. R.* 152, 155, and 156; Jones vs. Cook, 1 *Cow.* 309; Ontario Bank vs. Hallett, 8 *Cow.* 192; Ames vs. Webber, 8 *Wend.* 545; 8 *Cow.* 643 and 644; 1 *Hill*; 154; 3 *Hill*, 661, "Note 31."

It has been repeatedly held that unless the process is void upon which the sheriff arrested the prisoner, he is bound to detain him in custody and is responsible in an action for an escape, if he permits him to go at large. The distinction lies between void and voidable process. The latter is a justification to the officer to detain the prisoner until it is set aside by the party. There is good reason why the sheriff should not be allowed in this action to take advantage of an irregularity or error in judgment, or in the issuing of the process, and which for aught appears the party whose right it is to insist upon the defect does not wish to avail himself of it.

Chief Justice Savage says in the case of Parmalee vs. Hitchcock, 12 *Wend.* 97, "*Whether the sheriff is bound to execute an erroneous ca. sa. delivered to him, depends upon the question whether it is absolutely void or only voidable?*"

Again he says: "There can be no doubt a sheriff is justified in executing any process from a court of general jurisdiction, which is regular on its face. When an execution is delivered to him, he is not bound to inquire whether there is a judgment to support it, or whether the execution corresponds exactly with the judgment, if it is regular upon its face, it is his duty to execute it; if there is any irregularity or error in it, that affects the parties, not the ministerial officer." (5 *Wend.* 170; 8 *do.* 546, and 547).



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The question then to be determined in this case is whether this *ca. sa.* was void or not.

I feel constrained to say, after a careful examination of the case and the most mature deliberation, that I can not regard any of the objections taken to this process of such a character as would render it void. Is there any objection taken to the writ which is not amendable? Most clearly the defects suggested are amendable, and if so, the writ is not void (12 *Wend.* 97). I do not think it necessary to state in the writ the cause of action at all, or to show upon the face of the writ that it is such an action as would justify the issuing of a *ca. sa.*; especially when the process is issued by a superior court of general jurisdiction.

I know of no adjudication requiring it, and the precedents, many of them, do not (see *Bur. App.* 3 vol. 120, 121; *Yates Pl.* p. 60, § 127; p. 58, § 121). The following cases, in addition to those cited above, may be referred to as sustaining the positions above stated (*Cady vs. Quin*, 6 *Iredell*, 191; *U. S. Digest*, 1847, p. 444, 55-62; *Spafford vs. Goodell*, 3 *McClean*, 97; *U. S. Digest*, 1847, p. 221, § 1; 21 *Wend.* 351; *Brother vs. Cannon*, 1 *S. Car.* 200; *Robinson vs. Harlan*, 1 *S. Car.* 237; *Supplement U. S. Digest*, p. 784, § 418; 24 *Wend.* 381; 8 *Wend.* 79; 11 *Mass. R.* 177; 5 *Mass. R.* 310; *Ford vs. Treasurer*, 1 *N. & H.* 234, 3d vol. *U. S. Dig.* p. 434, § 145; 7 *J. J. Newell*, 149; 1 *Wend.* 115; 20 *Wend.* 236; 11 *John.* 474, 423; 5 *J. R.* 89; 7 *Hill*, 578; 1 *Hill*, 225; 16 *Wend.* 567; 3 *Denio*, 327; 3 *Barn & Al.* 502).

In debt, for an escape, the whole judgment is recovered (6 *J. R.* 270; 14 *J. R.* 255; 1 *Wend.* 117; 2 *R. S.* 437, § 63).

The execution in this case conforms substantially to the requirements of the 288th and 289th sections of the code of procedure, only that the words "*or be discharged*," which are erased, should be in the writ to make it conform strictly. The only departure from the strictest requirements of those sections is in the erasure of the words "*or be discharged*," which the 289th section requires to be inserted. This can not, however, be considered as rendering the writ absolutely void, as it is amendable (*Code*, § 173), and by § 176 the court is required in every stage of an

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Comstock agt. Olmstead.

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action to disregard any error or defect in the proceedings or pleadings which should not affect the substantial rights of the adverse party.

This defect in the writ can not prejudice the defendant in that judgment. The command of the writ is to commit him to jail until he shall pay the judgment according to law. Whereas, to make it conform strictly to the letter of the statute, it should be to commit him until he shall pay the judgment or be discharged according to law. This departure from the requirements of the statute, however, can not be considered, it seems to me, as rendering this writ void; if not, then the defendant is liable for the escape, and must be held to answer in this action.

Such being the conclusion at which I have arrived, I order and direct that the plaintiff recover his debt, and that a judgment be entered for the plaintiff for the amount of his judgment, with the costs of the same. But he can not in this action of debt for an escape recover interest upon the judgment, and judgment will be entered without interest (1 *Chitty's Cr. Law*, 33, 92, 93; 17 *W. R.* 255).

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### SUPREME COURT.

COMSTOCK agt. OLMSTEAD Adm'r of OLMSTEAD deceased.

A claim against an estate, can not be said to be unreasonably resisted by the administrator, where the credit was originally given and the amount charged to a *third person*, but on the hearing proved to be for the benefit of the deceased. And again, where the claim is *reduced in amount*, it can not be said to be unreasonably resisted.

A certificate of the referees that the claim was unreasonably resisted is no evidence (see 6 *Hill*, 389).

Costs against an administrator can only be recovered where he refuses to refer, or where the claim is unreasonably resisted or neglected.

Where the agreement to refer is not *filed* with the clerk and no *order* of reference entered, this court does not become possessed of the cause. The statute in that particular must be complied with (2 *R. S.* 89, § 36 and 37).

*Special Term, April 1851.* Motion for costs against an administrator.

MR. RICHARDSON, *for the Motion.*

MR. BACON, *for Defendants.*

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Comstock agt. Olmstead.

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GRIDLEY, Justice.—This application is made under the following state of facts. On the 30th day of July 1849, the defendant took letters of administration on the estate of the deceased. On or about the 15th of January 1851, the plaintiff presented to the defendant a demand against one Henry G. Mills, for which he claimed that the estate of the deceased was responsible, amounting to \$108.32, being the entire balance charged on his book against said Mills. It appears that the defendant doubted the justice of the claim, whereupon he and the said plaintiff executed an agreement to refer the matter to three referees; which agreement was approved by the surrogate on the 24th of January 1851; the referees heard the cause and reported in favor of the plaintiff the sum of \$110.78 cents, besides costs; and gave a certificate that the claim was unreasonably resisted. The affidavits further showed that there was no *order entered* referring this matter to the said referees, that the plaintiff claimed on the trial to recover about \$157, and proved that the goods were purchased by the deceased, for the said Mills however, and were also charged to Mills. No notice had been published requiring persons having demands against the deceased to present their claims, pursuant to the statute (2 R. S. 88, § 34).

The plaintiff claims a right to costs under the principles adjudged in *Harvey vs. Skillman* (22 *Wend.* 571). The construction given by Judge Cowen in that case to the 41st section of the act (2 R. S. 90, § 41), allows a recovery against an administrator, with costs, in all cases, where the notice before adverted to has not been published. The authority of this case is limited and questioned in the case of *Clapp vs. Curtiss*, (6 *Hill*, 386), and in *Bullock vs. Bogardus* (1 *Denio*, 276), and in *Bradley vs. Burwell*, (3 *Denio*, 266), it was directly overruled. No costs can be recovered now against an administrator unless it appears that the defendant refused to refer; or that the payment of the demand was unreasonably resisted or neglected. It is true that the referees have certified that the payment was *unreasonably resisted*. But this certificate is not evidence by the case in 6 *Hill*, 389, which case overrules that of *Foote vs. Guman* (12 *Wend.* 195), which held a con-

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Comstock agt. Olmstead.

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trary doctrine. In this case I think the defendant did not resist unreasonably. The demand claimed of him was an account charged to Mills, and the defendant might well doubt the obligation of the deceased to pay a claim in which the credit was originally given to Mills, and where the goods were actually charged to Mills (*Bently vs. Griffin*, 5 *Taunt.* 356; *Legget vs. Reed*, 1 *Car. & Payne*, 16; and an authority cited in a note to that case). Again the plaintiff sought to recover \$157 on the trial, but the claim was reduced to about \$110. When the claim was reduced in amount it can not be said to be unreasonably resisted (5 *Wend.* 74; 9 *Wend.* 448; 7 *Wend.* 522).

Again, I do not think that this cause was ever in the Supreme Court. The agreement does not appear to have been *filed* with the clerk nor the *order of reference entered*; and until the condition of the statute has been complied with, this court does not become possessed of the cause. The statute says "that if the executor or administrator doubt the justice of the claim he may enter into an agreement in writing with the claimant to refer the matter in controversy to three persons to be approved by the surrogate, and on *filing such agreement and approval* in the office of the Supreme Court or the clerk of the Common Pleas a rule shall be entered referring the matter to the persons so selected." "The referees shall thereupon proceed to hear the matter and make their report to the court in which the rule was entered." And then the proceedings are assimilated to the practice, on a reference in a court of record (2 *R. S.* 89, § 36 and 37). In commenting on this statute Ch. J. Savage says in *Robert vs. Ditmas* (7 *Wend.* 525). "There must be an agreement in writing, *filed*, as the *foundation of the rule to refer*; there must be a report, and that report must be confirmed." Again, in *Silmsee vs. Redfield* 19 *Wend.* 21), it was decided that the court will not review the proceedings in an action of tort, and that the plaintiff can not enter a rule for judgment, "unless *expressly authorized by the rule of reference.*"

On both grounds, therefore, the motion is denied.



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Inglehart agt Johnson.

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## SUPREME COURT.

INGLEHART Administrator &amp;c. of JOHNSON agt. JOHNSON.

Actions triable in Erie county, require all motions in relation to them to be made in the 8th district, as there are no counties out of that district adjoining Erie.

Therefore a motion noticed in Monroe to dissolve an injunction in an action, triable in Erie, held irregular.

*Monroe Circuit and Special Term, Nov. 1850.* Motion to dissolve or vacate injunction order. The county specified in the complaint as the place of trial is Erie.

A preliminary objection was made to hearing the motion, that Monroe county does not join Erie county, and the motion can not be heard in the former county, not being in the 8th district.

GEO. MUMFORD, *for Defendant.*

—— — *for Plaintiff.*

WELLES, Justice.—Although Monroe county is adjoining to the eighth district, yet it does not adjoin the county of Erie, which is designated as the place of trial of the action.

By § 401 of the Code, motions must be made within the district in which the action is triable, or in a county adjoining that in which it is triable, except that where the action is triable in the first judicial district, the motion must be made therein." The defendant's counsel supposes the true reading of the passage quoted, to be that the motion must be made in the district in which the action is triable or in a county adjoining such district. I think, however, the antecedent to the pronoun "that," in the passage in question, is "county," and means the same as if the sentence had been "or in the county adjoining the county in which it is triable." Such has been the received and practical construction of the section referred to, so far as I know. The motion is, therefore, irregularly noticed here, and must be made in the 8th district, there being no county out of that district adjoining Erie county. Motion denied.

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People agt. Baron.

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## SUPREME COURT.

## THE PEOPLE agt. BARON.

Where the printed cases, or error books, do not show a return made by the clerk below, the appellate court have no authority to hear the argument. Where irregularities in settling a bill of exceptions are complained of in the appellate court, they will stay proceedings for an application to be made in the court below (where it properly belongs) for correction.

*Monroe General Term, September 1850—Before WELLES, P. J. and SELDEN and JOHNSON, Justices.* Motion to set aside proceedings subsequent to settlement of bill of exceptions.

The defendant's counsel also moves to bring on the argument of the writ of error, and presents the printed cases or error books for that purpose.

S. V. R. MALLORY, *Dist. Att'y Ontario co. for the People.*

A. WORDEN, and E. G. LAPHAM, *for the Defendant.*

By the Court, WELLES, P. Justice.—The error book does not show that the clerk of Ontario county has ever made a return to the writ of error. This court is not, therefore, officially informed that such return has been made, and until that is done we can not hear the argument; we have nothing upon which to affirm or reverse the judgment in the court below.

There are various irregularities in obtaining the signatures of the justices in the court of sessions to the bill of exceptions, and in making up the record, complained of on the part of the defendants in error.

These we can not listen to for the purpose of making any other order than to stay proceedings here to allow the district attorney to move in the court below to have them corrected. That court has the exclusive power in those respects, and the only way in which we can interfere is by mandamus to set them in motion, on a proper state of facts appearing. For that purpose it should be shown that the court below refuse to act in reference to the matters complained of, which is not shown here.

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Barnum agt. Seneca County Bank.

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I think, therefore, the cause should be stricken from the calendar, and proceedings stayed until the next term of the court of sessions of the county of Ontario, to the end that the district attorney may then apply in that court for such relief in relation to the supposed irregularities as he may be advised. Ordered accordingly.

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## SUPREME COURT.

BARNUM agt. THE SENECA COUNTY BANK.

SUYDAM AND OTHERS agt. THE SAME AND OTHERS.

Where an appeal is taken from an order of the circuit judge, putting the cause over the circuit on certain conditions—a motion to dismiss such appeal should be made at the *general term*.

*Niagara Special Term, February, 1851.* These are actions in which relief of an equitable character is sought. Before the adoption of the present constitution of this state, jurisdiction of these would have belonged to the Court of Chancery. They were noticed for trial by the defendants and put on the calendar at the last Erie county Circuit Court. The plaintiffs moved to put them over the circuit. These motions were opposed by the defendants, who moved that the complaints be dismissed unless the trial proceeded. The judge holding the circuit, ordered the causes to go over upon certain specified conditions to be performed by the plaintiffs, and in case those conditions were not complied with, directed the complaints to be dismissed. From these orders the plaintiffs appealed to the general term

Mr. D. TILLINGHAST, now moves to dismiss the appeals upon affidavits showing, as he claims, that the requisitions of the Code, to render an appeal effectual, have not been complied with; and upon the further ground that the decisions at the circuit are not the subject of appeal under the Code.

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Barnum agt. Seneca County Bank.

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Mr. H. GARDNER, for the plaintiffs, objects that these motions can not be heard at a special term; that they must be made at a general term

SILL, Justice.—A general term of the Supreme Court, and a special term or circuit, stand to each other in the same relation which has ordinarily existed between courts of appellate and courts of original jurisdiction. It has always been understood to be the province of the court of appeal to determine for itself of what cases and questions it has jurisdiction, and likewise how and when it was obtained. The exercise of this power by the appellate tribunal, would seem indispensable to a full and perfect enjoyment of the important right of appeal.

The points presented here relate to the jurisdiction of the general term, and upon principle as well as by precedent, their decision belongs there.

These appeals are in character, much like an appeal under our former judicial system, from a vice chancellor to the chancellor. A motion to dismiss such an appeal was uniformly made to the chancellor.

There are cases in which the court, from whose decision an appeal has been attempted, has passed indirectly upon the effect of the measures adopted for that purpose, by directing its own decree to be executed notwithstanding the appeal. But I have not been able to find any decision holding that the inferior tribunal possesses the power to dismiss an appeal taken from its own order or judgment. If the exercise of such authority were allowed, a party might always be deprived of the right of appeal by the successive erroneous decisions of the tribunal whose judgment he is seeking to review.

I do not consider this reasoning any the less applicable to these motions, because the orders in question were made at a circuit, and these motions are at a special term. One officer holds both these courts, and these motions might at the defendants option, have been made at a special term, held by the same judge who made the orders appealed from.

It is said by the defendants' counsel that these applications



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Sayles agt. Wooden.

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are made at the special term in obedience to the 30th standing rule of the court. This rule directs that non enumerated motions shall be heard at *special terms, except when otherwise directed by law.*

The considerations already adverted to, would be sufficient to show that this rule was not intended, and should not be construed to embrace motions like the present, even if it had not contained any express exceptions.

But, as has already been remarked, the practice of addressing to the appellate courts motions to dismiss appeals, was uniform and settled. The preexisting practice, not inconsistent with the Code, was continued by the 469th section, until changed by the court.

It is not, perhaps, unreasonable so to construe this section as to bring these cases within the exception specified in the rule.

But if this should be considered too artificial an interpretation of the statute, I should still be of the opinion that these motions should be made at a general term.

The motions are accordingly denied without costs and without prejudice to any application that may be made at the general term.

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## SUPREME COURT.

SAYLES agt. WOODEN.

In pleading to an action of slander, it is not a sufficient justification to answer, that if the words were spoken as stated in the complaint, they are true. The defendant must state such facts as will show that the plaintiff is guilty of the crime imputed to him (see 4 *How.* 98, 347).

Hypothetical pleading is not allowed (see 5 *How.* 14, 470).

*Saratoga Special Term, December, 1850. Demurrer to an answer in an action of slander. The facts will sufficiently appear in the opinion of the court.*

WM. H. KING, *for Plaintiff.*

KIRTLAND & SEYMOUR, *for Defendant.*

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Sayles agt Wooden.

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CADY, Justice.—This is an action for slander. The plaintiff has put into his complaint eighteen causes of action; or what, before the Code, would have been called eighteen counts. It appears from the complaint that the defendant sued the plaintiff before a justice of the peace, and the defendant in that action verified his answer by making oath before the justice that he believed the said answer to be true; and eleven of the eighteen causes of action set out in the complaint, consist in substance of charges made by the defendant that the plaintiff in his verification of that answer swore false, or swore to a lie. The other seven causes of action alleged in the complaint do not in terms refer to that verification.

The defendant has put in three distinct answers or defences. The first denies each and every allegation in the complaint. In his second or further answer, he avers, that the facts set forth in the complaint are not sufficient in law to constitute a cause of action, in as much as the verification to the answer of the said plaintiff, as set forth in said complaint, would not if such answer were false constitute the offence of perjury; nor could the plaintiff have been indicted for perjury upon such verification at the time the slanderous words are alleged to have been uttered; and he craves the same benefit of this objection to the complaint, as if he had demurred to the complaint for that cause. In his third and further answer, he says, if he did speak and publish the several slanderous words in the complaint alleged, the same were true in substance and fact.

The plaintiff in his reply, instead of treating the defendant's second answer as a demurrer to the complaint, denies upon information and belief the allegations therein contained, thus taking issue thereon, as if the second answer contained allegations of facts, when in truth it contains only matters of law.

To the third answer the plaintiff has demurred, and specified various grounds for such demurrer; but, to decide the cause, it will not be necessary to examine the various grounds alleged for the demurrer. It will be enough to say that a plea in slander, that the words alleged to have been spoken are true, would not

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Holbrook agt. Homer.

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enable the plaintiff to prepare for trial. Suppose a defendant has said of a plaintiff, he is a thief; he has committed perjury; he is a murderer; and the speaking of such words is alleged in the complaint, and the defendant answers: if I have said that you are a thief, that you have committed perjury, and are a murderer; the words are true: how could the plaintiff prepare for trial? It would be impossible. When a defendant in an action of slander intends to justify the speaking the slanderous words, he must state such facts as will show the plaintiff guilty of the crime imputed to him (4 *How. Pr. R.* 98, 347). If all the causes of action stated in the complaint had in terms referred to the plaintiff's verification of his answer before the justice, he would then have known that all that he need prove was that that verification was true; but the 9th, 10th, 11th, 15th, 19th and 16th causes of action, stated in the complaint, contain no reference to the verification of the plaintiff's answer before the justice.

Again, hypothetical pleading is not allowable (5 *How. Pr. R.* 14, *McMurray agt. Gifford*).

I am, therefore, of opinion that the defendant's third answer is bad, and that the plaintiff is entitled to judgment thereon.

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## SUPREME COURT.

HOLBROOK agt. HOMER.

An auctioneer who receives goods for sale, under an agreement that he is to receive for his compensation all over a certain price, reserved by the owner, is liable to arrest under §179, where he does not pay over the reserved price after sale, according to the agreement, after demand.

A special motion for an exoneretur to be entered on an undertaking, or that the sureties be discharged from all liability thereon, on the ground that the action is one in which the defendant can not be arrested, irregular. The object of such a motion can only be obtained under §204.

*Albany Special Term, October 1850.* This was a motion for an order that an exoneretur be entered upon the undertaking

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Holbrook agt. Homer.

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made and filed in the action, or that the sureties be discharged from all liability thereon, upon the ground that the action was one in which the defendant could not properly be arrested.

The following facts appeared in the case: The plaintiff, a resident of New York, sent in July and August 1849, a quantity of engravings, frames, glass and fixtures to the defendant, then an auctioneer doing business at Albany, to be sold; the defendant to have all he could obtain above a certain price reserved, for his commissions in effecting the sales. On the 6th of October 1849, defendant wrote the plaintiff, informing him of the sale of a part of the property, and that the balance was subject to his order; and requesting him to draw on the defendant at thirty days for the reserved prices of the property sold; which the plaintiff did accordingly. The draft was accepted by the defendant but not paid. This action was soon after commenced and the defendant arrested, pursuant to an order granted in the cause and held to bail on the 12th of April 1850. The bail justified before notice of exception, which was afterward served, but the second justification waived by agreement between the parties upon the assent of the sureties to stand as bail.

A. DEAN, for defendant, examined at some length the law applicable to this class of cases, and contended that an auctioneer could not be arrested in such a case; the law did not apply to him in the ordinary transaction of his business, particularly where a draft had been drawn upon time by a party entitled to the proceeds of a sale, and the auctioneer had accepted the draft. Though he failed to pay, the transaction had become a mere matter of contract and credit (see *Code of 1848*, § 154; *Code of 1849*, § 179; 2 *How. U. S. Rep.* 202; 7 *Met. R.* 320; 1 *Code Rep.* 106, *White et al. vs. McAllister*). Implied trusts exist in all cases, and it would be unsafe to construe the statute to apply to all these, or any other than *express trusts*.

R. H. NORTHROP, for plaintiff, in opposition. The defendant was but the factor, agent or auctioneer of the plaintiff; the property before sale, and the reserved price after, was the property



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Holbrook agt. Homer.

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of the plaintiff, and the defendant was not authorized to convert it to his own use, without plaintiff's consent. There was no contract made between the parties by which the title to the proceeds of the sale became vested in the defendant for a day, he did not ask permission to use the money and had no right to appropriate it to his own use. He desired the plaintiff to draw for it at thirty days, a reasonable time to collect it in, and no more. His neglect to pay it in the manner proposed did not change the title to it, though he again bound himself to pay by accepting the draft. The answer admits defendant received the money; if it was plaintiff's money, defendant was liable to arrest for not paying it over.

The order asked for can not be granted. If defendant was not liable to an arrest, he should have moved to vacate the order before justification by the bail under §204 of the Code; the object of this motion can not be attained except under that section, which gives ample relief, if the order is granted improperly or in an improper case. The provisions to exonerate bail do not apply to this case (see § 191).

WATSON, Justice.—I think the defendant was liable to arrest under § 179. If he were not, the object of this motion could only be obtained under § 204. The provisions of the Code (§191) as to the exoneration of bail do not apply to this case. The motion must be denied, with ten dollars costs.

Corning and Winslow agt. The Troy Iron and Nail Factory and Burden.

SUPREME COURT.

CORNING & WINSLOW agt. THE TROY IRON AND NAIL FACTORY AND  
H. BURDEN.

Where the plaintiff appears to be entitled to a decree for a perpetual injunction, he may have a temporary injunction also, *pendente lite*, provided it is necessary to protect him from injury. The law in regard to injunctions has not been materially changed. (*The case of Cure agt. Crawford*, 5 How. 293, not concurred in.)

It is not enough for a plaintiff, to entitle him to a temporary injunction, to show that the continuance of the acts complained of will do him an injury; he must also show that it is a case in which he will be entitled to final relief by injunction.

The obstruction of water courses are such grievances as call for the equitable remedy by injunction (*Story's Eq. Juris.* § 927; *Eden on Injunctions*, 168; *Angell on Water Courses*, § 444, &c).

Where the defendants constructed a large reservoir above their mills, by damming the stream and erecting a dyke for the purpose of securing a more equable and continuous flow of the water; which gave to them a control over the water; and which plaintiffs claimed, were exerted by the defendants to the great damage and injury of the plaintiffs in the use of their mills and machinery below, on the same stream (notwithstanding it appeared that said reservoir might, with proper management, have been beneficial to plaintiffs); and it appearing that both parties were equally entitled, as riparian proprietors, to the use of the stream, held, that the plaintiffs were entitled to an injunction, *pendente lite*, of an action for damages for such injuries, and to secure protection against future injuries of like character.

*Albany Special Term, May 1851.* This was an application for an injunction to restrain the defendants from closing the waste gate of their dam or reservoir. An injunction had been allowed by a justice of this court at chambers, which was subsequently modified on application of the defendants, and an order made to show cause at special term why an injunction order should not be made according to the prayer of the complaint. The application was made on the complaint and affidavits, and was also resisted on affidavits. Many affidavits were read on both sides. The facts are sufficiently stated in the opinion of the court to show what questions of law were decided.

HILL & PORTER, for Plaintiffs.

SAMUEL STEVENS, for Defendants

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Corning and Winslow agt. Troy Iron and Nail Factory and Burden.

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PARKER, Justice.—The mills of the defendants are situated on the Wynant's Kill, above, and eastwardly of the mills and machinery of the plaintiffs. Both parties claim the right to use the water as riparian proprietors of the land over which the stream passes. The land of the plaintiffs has been owned and occupied and the water of the stream used for hydraulic purposes, by them and the persons under whom they claim, for over sixty years. The defendants derive their title to the land above, on the same stream, from the same common source; though it has been held and enjoyed by them for a term of time much shorter than that of the plaintiffs.

In 1846, the defendants constructed a large reservoir, above their mills, by damming the stream and erecting a dyke on the north side, for the purpose of securing a more equable and continuous flow of the water, which was liable to be interrupted by mills still further up on the same stream. That dam, being carried away by a freshet in the autumn of 1850, was rebuilt by the defendants. The reservoir was large in proportion to the size of the stream, and gave to the defendants a control over the water that might be exerted to the great detriment of the plaintiffs. The plaintiffs claim that it has been so exerted. That at times they have been for a long time, deprived entirely of the natural flow of the water, and at other times the water has been discharged upon them in torrents, to their very great injury. The plaintiffs allege that this has been done frequently, unnecessarily and at unseasonable hours, and with a view to their injury; and that in consequence thereof the plaintiffs' several mills dependent upon the stream for water power, and for water for generating steam, have been rendered at times useless. That great numbers of their workmen have been interrupted in their labor, and that the plaintiffs have been delayed and prevented from complying with their business engagements. It appears that the amount invested in the plaintiffs' mills and machinery is not less than \$250,000, and that such property would not be worth more than one-eighth of such valuation for manufacturing purposes, if deprived of the uniform use of the stream of water in question.

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The evidence before me is certainly very conflicting upon many of the matters in controversy—and upon most of them, it is not necessary at this stage of the action to express any opinion. It can not be doubted, however, but the plaintiffs have sustained great injury from the irregular supply of the water, and that such irregularity is principally chargeable to the defendants' reservoir, and to the manner of its use. This action is brought to recover compensation for such injury, and to secure protection against future injuries of a like character.

I do not see that either party has gained or lost any legal rights to the use of the water by prescription. Both parties have a right to the use of the stream, according to its natural and accustomed current, unless there has been a diversion, or a use of the water in a manner inconsistent with its full enjoyment, for a time sufficiently long to ripen into a legal right (*Merritt vs. Brinckerhoff*, 17 *John. R.* 306; *Angell on Water Courses* 4th ed. § 115 to 119, and cases there cited). I think this case governed by the well settled principle, that every riparian proprietor has a right to a reasonable use of the water, as it passes over his land; and for that purpose, he may erect a dam and machinery, subject however to the limitation, that the water must be so used as to protect the owner of similar property below, against serious damage. Both parties are allowed to participate in the benefits of the stream to a reasonable extent.

It is certainly no answer to this application or to this action, to say that the plaintiffs have been benefitted by the construction of the reservoir. The reservoir, properly managed, may be beneficial to the plaintiffs, by equalizing the flow of the water; but improperly managed, it might greatly increase the irregularity of the supply. In no case can a defendant escape liability for doing an injury by setting up an independent benefit conferred on the plaintiff.

It is objected that this is not a proper case for relief by injunction. To entitle the plaintiffs to such a remedy, their legal rights should, in the first place, be clearly established. They are so, I think, in this case. The right of the plaintiffs to the use of the



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water is not controverted. The fact that such right has been invaded is also shown by the proofs before me.

Is the injury of such a character as to warrant an interference by injunction? I can not concur in the conclusion of the learned justice, who delivered the opinion in *Cure vs. Crawford* (5 *How. Pr. R.* 293), that, under the Code, an injunction may be granted in every case where the act sought to be restrained would "produce injury to the plaintiff." The 219th section of the Code of 1849, under which, it is supposed, such provision is made, reads as follows: "Where it shall appear by the complaint, that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, *would produce injury to the plaintiff*, &c., a temporary injunction may be granted to restrain such act." This is only saying that where the plaintiff appears to be entitled to a decree for a perpetual injunction, he may have a temporary injunction also, *pendente lite*, provided it is necessary to protect the plaintiff from injury. That is to say, that the act may be restrained by temporary injunction, if the commission of it would produce injury to the plaintiff; and if, also, the nature and extent of the injury be such as to entitle the plaintiff to a final perpetual injunction. Both these grounds must be shown to exist before a temporary injunction can be allowed. If this is the right construction of the section, the law in regard to injunctions has not been materially changed. There was certainly no reason for changing it, and I can not think it was intended to do more than to regulate the practice and render it uniform.

The construction given in *Cure* agt. *Crawford* has been sought to be upheld, because in the Code of 1848, § 193, the words "great or irreparable" were inserted before "injury," which words have been omitted in the Code of 1849, in the section above quoted. The effect of these words in the Code of 1848, was to restrict the issuing of temporary injunctions to very narrow limits. Under that section the plaintiff, to obtain such injunction, was required to show not only that he would be entitled

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to a final perpetual injunction, but also that the injury, *pendente lite*, would be "great or irreparable." There were many cases in which a final injunction might be decreed, where the injury, if committed, would have been less serious; but in no case under the Code of 1848, could a temporary injunction issue, unless the act restrained would, if committed, produce an injury, "great or irreparable." This was a new restriction upon equitable remedies that could not have been deemed necessary, and therefore the section was amended in 1849.

If the true construction of the 219th section of the Code of 1849, is, that an injunction may be issued in every case of injury or threatened injury, then the plaintiff is entitled to it whenever a trespass has been committed upon his property, and even when injury is threatened to his person. Injuries of every description and of the most trifling character would entitle a plaintiff to an injunction. But if, in addition, the plaintiff, to entitle him to such temporary injunction, must show that it is a case in which, by law, he will be entitled to a final perpetual injunction, then there is no reason to complain of the section in question.

It is not enough, therefore, for the plaintiffs, to entitle them to a temporary injunction, to show that the continuance of the acts complained of will do them an injury. They must also show that it is a case in which they will be entitled to final relief by injunction.

In regard to private nuisances, the interference of courts by way of injunction, is undoubtedly founded upon the ground of restraining irreparable mischief, or of suppressing oppressive and interminable litigation, or of preventing multiplicity of suits (*Story's Eq. Juris.* § 925, and cases there cited); and Story says "there must be such an injury as from its continuance or permanent mischief, must occasion a constantly recurring grievance, which can not be otherwise prevented but by injunction;" and (§ 927) he enumerates the destruction of water courses as being of that description. It is well settled that the equitable remedy by injunction is applicable to such a case (*Eden on Injunctions*, 168; *Angell on Water Courses*, §§ 444, 445, 446; *Finch vs. Res-*

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bridger, 2 *Vern. R.* 390; Society, &c. vs. Morris Canal Co. 1 *Saxton Ch. R.* 157; Smith vs. Adams, 6 *Paige R.* 435). In Robinson vs. Lord Byron (1 *Bro. C. C.* 588), where an injunction was prayed for against using the water of a stream in any other manner than it had been used before; and it appeared that the defendant sometimes withheld the water, and at other times discharged it, in such quantities as to create a danger of sweeping away the plaintiff's mills, the injunction was granted as prayed, until an action then pending for the injury complained of was decided; and the right being found for the plaintiff, the injunction was made perpetual. It has been frequently decided that courts of equity have concurrent jurisdiction with courts of law, in a case of private nuisance for diverting or obstructing an ancient water course, and may issue an injunction to prevent the interruption (*Eden on Inj.* 164, rule 7; Gardner vs. Newburgh, 2 *John. Ch. R.* 162; Van Bergen vs. Van Bergen, *id.* 272; Belknap vs. Belknap, *id.* 463; 3 *John. Ch. R.* 282; 5 *id.* 101; 6 *id.* 439; Case vs. Haight, 3 *Wend. R.* 632; *Angell on Water Courses* § 450; Arthur vs. Case, 1 *Paige R.* 447). In addition to the consideration that injuries of this nature are generally irreparable, and such is, I think, clearly shown to be the case in this instance; the continuance of the injury would in time ripen into an adverse prescriptive right, in violation of the legal rights of the plaintiffs. This is also assigned as a reason why the injured party in such case should have the protection of a preliminary injunction (*Angell on Water Courses*, § 449, and cases there cited). The plaintiffs are therefore entitled to the protection of an injunction, pending the litigation.

It is next objected that if the plaintiffs are entitled to a preliminary injunction, it can not be granted in the form specifically asked for in the complaint; and therefore that the application should be denied. This is an application to grant, not to dissolve an injunction. The complainants pray specifically in their complaint for an injunction restraining the defendants from closing the gate of their dam. Such an order would relieve the plaintiffs, because it would give them the natural flow of the stream; but it



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might inflict a great and unnecessary injury on the defendants, by depriving them entirely of the use of the water of the stream; because it appears that the defendants' machinery is propelled by water conducted to their water-wheel by an aqueduct leading from the defendants' reservoir. Such an order would be clearly inequitable. Both parties are entitled to the use of the stream; and no order must be made for the protection of the plaintiffs, which will infringe upon the legal rights of the defendants.

An injunction order can be made, however, which will protect the plaintiffs, and will not interfere at all with the defendants' enjoyment of the water, viz: an order restraining the defendants from raising the waste gate of the dam. Such relief is entirely consistent with the facts alleged in the complaint and may be granted under the general prayer for relief (1 *Barb. Ch. Pr.* 37, *Colton vs. Ross*; 2 *Paige*, 396, and cases there cited). By keeping the gate closed, the plaintiffs will get all the surplus water, after the filling of the defendants' reservoir, either from the overflowing of the dam, or through the defendants' aqueduct; and will be saved the annoyance of a deprivation of water and the injury resulting from the water being poured down suddenly upon them.

The injunction order must therefore be so modified as to require the defendants, and each of them, to refrain and desist from opening or permitting to be opened the waste gate of the defendant's dam, except on a sudden emergency it shall become absolutely necessary to do so in order to repair their said dam or machinery; and then only on due notice to the plaintiffs, and at an hour least likely to conflict with their interests; and that the defendants do also refrain and desist from opening or using the gate of the aqueduct, leading from the defendants' reservoir to their machinery, except when the defendants are using the water to propel their machinery, and they must be enjoined generally against impeding the uniform and continuous flow of the water from the pond above said dam.



Buffalo and State Line Rail Road Co. agt. Reynolds and wife.

## SUPREME COURT.

THE BUFFALO AND STATE LINE RAIL ROAD COMPANY agt. REYNOLDS  
AND WIFE.

Where a Rail Road Company, being unable to agree with the owner of land wanted for the road, make application to the court by petition, for the appointment of commissioners, under the general Rail Road act passed April 2, 1850, and the facts alleged in the petition, or any of them, are denied by the owner, upon which an issue is formed, the *proof* required to be produced by the owner to disprove the facts alleged, must be *legal evidence*; the party's own *affidavit*, or any other affidavit, will not answer.

*Erie Special Term, August 1851.* Application for the appointment of commissioners, founded upon the petition of the Buffalo and State Line Rail Road Company, pursuant to section 14 of the general rail road act, passed April 2, 1850. The petition contained the allegations required by the law, and among them, that the company had not been able to acquire the title to the lands described in the petition, and that the reason of such inability was, that they had been unable to agree with the owner of the land as to the amount of compensation to be paid for the acquisition of the title. The defendant Reynolds showed cause against granting the prayer of the petitioners, and *denied* the above allegation. He alleged that the petitioners were in possession of the land, and were constructing their road thereon, under and by virtue of a contract made by him with the Dunkirk and State Line Rail Road Company and that the petitioners were the assignees of such contract.

In support of the issue on the part of the defendant, he offered to read his and other affidavits. The petitioners objected. They were read; the question of their admissibility being reserved. The defendant also called witnesses.

GROSVENOR & HAVEN, *for Plaintiffs.*

GEO. BARKER, *for Defendants.*

MARVIN, Justice.—The defendant claims that in February last he entered into a contract with the Dunkirk and State Line Rail

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Road Co. for the sale of the land in question. That that company entered upon the land with his permission, and worked thereon until in May, when an arrangement was entered into between different rail road companies, by which the Dunkirk and State Line Rail Road Co. were to abandon the construction of their road and the petitioners were to construct theirs, and were to succeed to all the rights acquired by the Dunkirk and State Line Rail Road Co. and to assume all their contracts and liabilities. That the petitioners entered under this arrangement, and he claims they are bound by the contract he alleges he made in February with the Dunkirk and State Line Rail Road Co. and that therefore they have not been unable to agree as to the compensation to be paid to him for the land.

The main object of the defendant's affidavit is to establish the contract with the Dunkirk and State Line Rail Road Co. for the sale of the land.

It was not claimed that the defendant could successfully resist this application, unless he made a case which, as against the Dunkirk and State Line Rail Road Co. would, in equity, entitle him to a judgment for a specific performance. The petitioners are not willing to pay the price demanded by the defendant, and the parties have not been able to agree upon the compensation, unless they are bound by the alleged agreement made in February.

Can the affidavits of the defendant and others be used upon this application?

The 14th section of the act directs, among other things, what the petition must contain. By the 15th section "all persons whose estates or interests are to be affected by the proceedings, may show cause against granting the prayer of the petition, and may disprove any of the facts alleged in it. The court shall hear the proofs and allegations of the parties, and if no sufficient cause is shown against granting the prayer of the petition, it shall make an order, &c.

If the person whose estate or interest is affected, denies any of the facts alleged in the petition, an issue is then formed, and the

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statute imposes upon him the burden of proof; he may *disprove* the facts alleged. The court is to hear the *proofs* and allegations of the parties. The evidence to disprove the facts alleged in the petition, must be *legal evidence*. This is the only evidence which the court is directed to hear. The words, evidence and proof, are often used as synonymous; in strictness, however, the latter is an effect of the former. "Proof is that quantity of appropriate evidence which produces assurance and certainty; and evidence, therefore, differs from proof as cause from effect" (*Wills on Cri. Ev.* 2, 3; see also *Green. Ev.* 1; *Jacobs's L. Dict. Proof and Evidence*). When a statute requires *proof* to be made, it must be made by *legal evidence*, unless from the context or other qualifying words it is apparent the legislature intended that the fact might be shown by affidavit, or in some other manner.

It is a general rule in construing statutes, that when a word is used, the meaning of which is well known at common law, the word should be understood in the same sense it was understood at common law (*Bac. Ab. Statutes* I. 4).

In *Brown vs. Hinchman*, 9 *J. R.* 75, the court, in construing the words "shall prove to the satisfaction of any justice," &c. say, "Proof here means *legal evidence*, and that can not be by the party's own oath, unless the statute expressly says so." (See also *Terry vs. Fargo*, 10 *J. R.* 114; *Van Steenburgh vs. Harty*, 10 *J. R.* 167.)

The legislature has in many cases authorized facts to be proved or shown by the oath of the party or by affidavits.

In the present case there is nothing in the language of the act qualifying the words *disprove* and *proof*, and their meaning, at common law, is clearly defined. They do not justify the use of affidavits upon the trial of the issue formed between the parties. The affidavits read to disprove the facts alleged in the petition, are therefore excluded from consideration.

I have carefully considered all the *competent* evidence produced by the defendant, and in my opinion it falls far short of establishing even a parol contract for the purchase and sale of the land. The parties negotiated; the company entered upon

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Pike agt. Van Wormer.

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the land without objection, but there is no evidence that the parties ever agreed upon a price.

Commissioners must be appointed in accordance with the prayer of the petition.

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## SUPREME COURT.

PIKE agt. VAN WORMER.

Where words used convey a clear and direct imputation of a slanderous character, they are actionable in themselves; and need no colloquium or other averment to aid them in support of the action. But such averments are necessary to sustain the action, where the words are ambiguous and uncertain in their meaning.

The Code has changed the common law rule of pleading in actions of slander in one particular; that is, although it may be uncertain to whom the words were intended to apply, it is no longer necessary to insert in the complaint any averments showing they were intended to apply to the plaintiff.

The charge that the plaintiff is "a dealer in counterfeit money," held that the words are actionable in themselves.

A charge of "passing counterfeit money," and a charge of being a "bogus pedler," are words not actionable in themselves; being uncertain in their import. (*See this case in 5 Howard, 171.*)

*Albany Special Term, March 1851.* Motion for judgment on the ground of the frivolousness of the defendant's demurrer to the complaint.

The action is for slanderous words. The complaint contains three separate causes of action, each alleging, substantially, the same words. The *first* states that in a conversation had with the plaintiff at *Princetown*, the defendant said to and concerning the plaintiff, "*You are a dealer in counterfeit money;*" "*you have passed counterfeit money;*" "*you are a bogus pedler;*" "*you passed counterfeit money to Gilbert Liddle,*" and several other persons, naming them. This cause of action then proceeds to allege that the words "*bogus pedler,*" are commonly used to denote a person who knowingly sells, passes or exchanges counterfeit money for a consideration, with intent to have the same uttered and passed; and that these words were used in that sense



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by the defendant, and were so understood by those that heard them. The statement of this first cause of action then concludes as follows: "that by the defamatory statements and expressions, in this count set forth, the defendant meant and intended to insinuate and cause it to be understood and believed by the bystanders, who heard the same, that the plaintiff had been and was, guilty of the crime of forgery. The statement of the *second* and *third* causes of action is, in each case, substantially like the *first*. In the *second* cause of action, the same words are alleged to have been uttered at a different time and place. In the *third* cause of action the same words are alleged to have been spoken *of and concerning* the plaintiff.

J. C. WRIGHT, *for Plaintiff*.

J. G. McCHESNEY, *for Defendant*.

HARRIS, Justice.—This case has once before been before the court upon a demurrer to the complaint (see 5 *Howard*, 171). The decision then, so far as it involved any question now presented, must, for the purposes of this motion, be regarded as the law of the case. But it is not improper to say, that, though I might not feel inclined to concur in some of the views expressed by the very able judge who made that decision under the first general proposition discussed by him, I do entirely concur in the soundness of the principles upon which he put the decision of the question before him.

Where the words used convey a clear and direct imputation of a slanderous character, they are actionable in themselves. They need no colloquium or other averment to aid them in supporting the action. But where the words themselves are ambiguous, or where the subject matter to which they are intended to relate, or the person to whom they were intended to apply, is uncertain, there, at common law, they need the aid of a colloquium, or some other averments, to help them in sustaining the action. In one of these particulars, and only in one, the Code has changed the common law rule of pleading. Now, even though it may be uncertain to whom the words were intended to apply, it is no

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Pike agt. Van Wormer.

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longer necessary to insert in the complaint, any averments showing that they were intended to apply to the plaintiff. But in other respects, the same averments are requisite in pleading under the Code, as at common law.

It was very properly held upon the former occasion that the charge of passing counterfeit money was not of itself, actionable. The terms are uncertain in their import. They may impute a crime, but in a majority of cases he that passes counterfeit money is innocent of that criminal intent which alone renders the act criminal. If, therefore, a plaintiff insists that the charge is slanderous, he must allege and prove such circumstances as will show that it was uttered with a slanderous meaning. But the plaintiff in his amended complaint, has inserted a charge which does not seem to have been found in the original; and which, I think, is actionable of itself. It is the charge that the plaintiff is "a dealer in counterfeit money."

It was insisted upon the argument of the motion, that these words were capable of an innocent construction, and that, therefore, a slanderous meaning should not be attached to them. This was once the rule; words were to be taken in *mitiori sensu*, and, if possible, innocently construed. But the rule now is, that words are to be taken in that sense in which they are generally understood, and where that puts upon them a guilty sense, it is incumbent on the defendant to show that they were innocently used. Judging of these words by this criterion, they are clearly actionable. They convey to every mind the idea of a crime, for which the party accused might be prosecuted and punished.

I think, too, that in respect to the remaining charge of being a "bogus pedler," the complaint has been amended so as to bring it within the principle of the former decision. The words themselves do not necessarily impute crime. The phrase "bogus pedler," is a *provincialism*, which has not acquired a meaning sufficiently definite to allow the court to take judicial notice of its import. Its meaning, as has been properly observed by Justice WILLARD, is the subject of evidence and should be averred; it is an issuable fact. For the want of such an averment the original complaint

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Colver, Appellant agt. Van Valen Respondent.

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was held to be defective; but this defect is now supplied. The meaning is now alleged. It is such as, in the appropriate language of the former opinion, designates the party to whom the words are imputed as "a man engaged in a business which the law denounces as criminal."

My opinion therefore is, that, although all the words alleged in any one cause of action may not be actionable, each cause of action does contain words which are stated in a manner to make them actionable. The plaintiff is therefore entitled to judgment upon the demurrer; but, as it may have been interposed in good faith, the defendant may have leave to answer within twenty days, upon the payment of the costs of this motion.

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SUPREME COURT.

COLVER Appellant agt. VAN VALEN Respondent.

Where the requisite facts and circumstances are set forth in an affidavit to a justice of the peace for an attachment against a defendant under the Revised Statutes, on the ground that he has departed the county with intent to defraud his creditors, &c. The affidavit is insufficient, unless, in addition to such facts and circumstances, the plaintiff adds his belief that such acts were done by defendant *with intent to defraud his creditors*.

An affidavit which would be deemed sufficient under the non imprisonment act of 1831, will so be held on application under the Revised Statutes.

Where the justice used another affidavit, of a *different plaintiff*, made for the same purpose, and at the same time, with the one decided to be insufficient, *held*, that the attachment was properly issued in favor of the plaintiff whose affidavit was declared insufficient; especially, as no such objection was made by defendant on a motion before the justice to quash the attachment.

*Owego General Term, May 1851.* An attachment was issued in a justice's court and a judgment was rendered against the defendant of about twenty-five dollars, damages and costs, on the 10th December, 1847, which was reversed by the county judge of Cortland county, on the ground of the insufficiency of the affidavit.

The affidavit of the plaintiff, after stating that he had a demand arising on contract of twenty dollars, &c. proceeds to say,

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“that the application is made on the ground that the defendant has departed the county with intent to defraud his creditors; and further that the said James Van Valen has failed in business and stopped payment to his creditors. That a large portion of his property is under execution, and has been assigned away; and that the said James has a large quantity of personal property concealed in a house or outbuildings of Lewis Bogardus, liable to be taken on execution, and further says not.”

STEPHENS & DUELL, *for Appellants.*

MR. REYNOLDS, *for Respondent.*

By the Court, MONSON, Justice.—I think this affidavit is not sufficient according to the decisions in 4 *Denio*, 120, and 1 *Barb. Sup. Court*, 554. The plaintiff should have added his belief that the acts set forth in the affidavit were done by defendant with intent to defraud his creditors. Belief of fraudulent intent, standing alone, is not sufficient. But I think the requisite facts and circumstances are here stated, had the plaintiff's belief been superadded.

But there was an affidavit of George Colver, upon an application by him for an attachment against the same defendant, before the justice and which he took into consideration, which stated that the defendant had departed from the county with intent to defraud his creditors, or with intent to avoid the service of any civil process, and “further says that the said James Van Valen has recently been sued by several of his creditors; that he has assigned, disposed of or secreted his property, with intent to defraud his creditors, and has refused through his agent to pay; that the store of the said James is locked, and that the said James has property concealed in a house of said Lewis Bogardus in Truxton, which is liable to execution.”

I consider this affidavit sufficient under the non imprisonment act. And it was decided at the general term in Ithaca in July 1849, in this very case, that the proceedings would be sustained if the affidavit was sufficient under the non imprisonment act of 1831; although the application was made under the Revised Statutes, upon the ground that the defendant had departed the



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county with intent, &c. The only question then is, was it proper for the justice to take this affidavit into consideration upon the application for an attachment by David J. Colver, the plaintiff in this suit.

In 14 Meeson & Welsby, 104, on application to a judge to hold to bail, it was decided that the plaintiff might use affidavits made and used shortly before on a similar application against the same defendant at the suit of another plaintiff entitled in the former suit and in another court.

The affidavit of George Colver was not entitled, and was made before the same court at the same time with that made by the plaintiff, and against the same defendant.

Now I can see no reasonable objection to the use made of it by the justice for the purposes of this suit. The act of 1831, § 35, p. 404, says that the plaintiff shall by his own affidavit or that of some *other person* or persons prove to the satisfaction of the justice the facts and circumstances, &c. If the objection be that after an affidavit has been once used, it becomes *functus officio*, and has lost its vitality, it may be said in the first place that it does not appear that the affidavit of George Colver had been used, and if it was first used in this suit, then the objection, if it has any force, would only affect the validity of the attachment issued in the suit of George Colver. But the idea that an affidavit from once using becomes inoperative for ever thereafter, seems to me to be more fanciful than sound.

In 20 Johnson, 274, Boyce vs. Thompson, and five other causes in which the names of the parties were different, notice of the rule to plead was directed to each of the defendants respectively, and an affidavit of the service entitled in all the causes was filed, and a default entered thereupon by the clerk in each cause. A question was submitted to the court whether the clerk was entitled to charge for reading and filing an affidavit in each cause. The court said the clerk was entitled to charge for making and filing an affidavit in each cause. The parties are different. The clerk must enter a default founded on an affidavit in each cause. Here the filing of one affidavit au-

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authorized the clerk to enter default in six causes of different titles and charge accordingly. In 1 *Denio*, 682, *Schermerhorn vs. Noble*, the court said that one set of papers was sufficient on which to found motions for judgment as in case of nonsuit in that and thirty-one other causes in favor of the same plaintiff against different defendants. In 6 *Cowen* 45, *Prescott vs. Roberts*, the venue was laid in the county of Onondaga and the cause noticed for trial and inquest, and defendant filed an affidavit of merits. The venue was changed by stipulation between the parties to the county of Rensselaer, where an inquest was taken on the ground that no new affidavit of merits was filed. But the court set aside the inquest saying that one affidavit extended through the whole progress of the cause; that a new affidavit need not be filed every time that the cause was noticed, and that a change of venue did not vary the principle.

The return states that in addition to the affidavit of David J. Colver, other proof was produced to the justice to entitle the said David J. to an attachment, that George Colver appeared, previous to the issuing of said attachment and made affidavit, &c.; and the return does not state that any objection was made to the use of this affidavit of George Colver, by the attorney of defendant, who appeared on the return day of the attachment and moved to quash the proceedings. In 1 *Com.* 92, *WRIGHT*, Justice, in delivering the opinion of the court says, where opportunity is given for objections, and none are made, but the party whose duty it is to object remains silent, all reasonable intendments will be made by a court of error to uphold the judgment. This doctrine, founded in good sense, has been promulgated in a series of decisions by the courts of this state. In the case of *Baldwin vs. Calkins* (10 *Wend.* 167), on certiorari the Supreme Court held that an omission to object will even authorize the inference of a fact necessary to confer jurisdiction, (see also the case of *Oakley vs. Vanhorn*, 21 *Wen.* 305).

Courts have ever been disposed to exercise liberality and every warrantable intendment in order to sustain pleadings and proceedings in Justices' Courts. This should be applied to attachments

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Vermont Central Rail Road Co. agt. Northern Rail Road Co.

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in an especial manner which do not admit, from the circumstances which usually attend the drawing of affidavits, of that care and leisure which parties can ordinarily bestow on other proceedings in Justice's Courts.

I am of opinion that the affidavit of George Colver was properly taken into consideration in this case, and if that were questionable, that the defendant is precluded from taking the objection, because his attorney omitted to raise it before the justice when he moved to quash the attachment.

The judgment of the County Court should be reversed and that of the justice affirmed.

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SUPREME COURT.

THE VERMONT CENTRAL RAIL ROAD COMPANY agt. THE NORTHERN  
RAIL ROAD COMPANY.

A motion to change the place of trial can not be made, before a written demand for the required change is made, under § 126 of the Code.

But the change is not effected, after the proper demand has been served under that section, until the *order* of the court upon motion (*Rule 3*).

*Jefferson Special Term, July 1851.* The plaintiff is a foreign corporation having no residence in the state. The defendant's road is located in the counties of St. Lawrence, Franklin and Clinton. The venue in this action is laid by the complaint in the county of Oneida, where it is conceded the defendant has no legal residence. Before the time for answering expired the defendant's attorney demanded in writing, under section 126 of the Code, that the trial be had in the county of St. Lawrence. That was disregarded, and this motion is made to change the *venue* to the county of *Franklin*, as to which *no demand* has been made

C. G. MYERS, *for the Motion.*

F. KERNAN, *Opposed.*

HUBBARD, Justice.—This action is transitory, and the venue must be governed by the residence of the parties, or some of them,

Vermont Central Rail Road Co. agt. Northern Rail Road Co.

under section 125 of the Code. The county of Oneida being improperly designated as the place of trial in the complaint, the venue must be changed, upon the proper application, provided the defendant has any legal residence in any county within the state. But whether a rail road corporation can be said to acquire any such *residence*, or whether if it can the county of Franklin is the locality because the principal office or place of business of the defendant is at Malone, I find it unnecessary to decide in the disposal of this motion.

The motion must be *denied* on the ground that *no demand* in writing, pursuant to section 126 of the Code has been made that the venue be changed to Franklin. It is not certain that the demand of trial in St. Lawrence is of any importance on this motion, but it is insisted that a demand is not indispensable, that a motion may be made in the first instance.

By the judiciary act of 1847, section 46, the only remedy was by motion, if an improper venue was designated, and such motion was required to be made before the time for answering expired. The Code preserves the principle of that act in regard to the locality of the venue, but substitutes a *new practice* in relation to removal. By the 126th section a written demand in place of the motion, is required. A motion is only requisite or allowable, it seems to me, in the event the demand is disregarded. The object of this material change of the practice in this particular may have been, and probably was, to allow the plaintiff an opportunity of voluntarily correcting his error by amendment, stipulation or otherwise, without the expense and delay of a motion.

The demand alone, it seems does not *ipso facto* operate to change the venue. If not changed by the voluntary act of the plaintiff, it must be effected by the *order* of the court on motion. This *order* is clearly contemplated by rule 3 of the Supreme Court, which provides that in case the place of trial is changed for the reason that the proper county is not specified as required by section 125 of the Code, the papers on file at the time of the *order making such change*, shall be transferred to the county *specified in such order*. The venue is changed by the order, and not by



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Blake agt. Locy.

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force of the demand. As the *statute* prescribes the practice, it seems imperative that a written notice requiring the removal of the venue to the proper county should first be served, and until that is done, a motion is premature.

I have used the term *venue* as synonymous with the place of trial to be designated in the complaint, and in contradistinction to the *place of trial* with reference to the convenience of witnesses &c. The term is omitted in the Code, although the distinction between the *venue* and *place of trial* is preserved, as it existed under the judiciary act, and for perspicuity the words may still with propriety be used, when defining the *statutory locality* for the trial.

The motion is denied with \$10 costs of opposing, and as the practice is unsettled, without prejudice to any future proceeding under sections 125 and 126 of the Code, to change the *venue*.

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## SUPREME COURT.

BLAKE agt. LOCY.

An affidavit and notice of motion entitled in the wrong court, are not objectionable, where they sufficiently refer to the action and proceedings which are the subject matter of the motion (*Code*, § 406).

Neither is a notice of motion objectionable, which does not point out the irregularity complained of, where the irregularity sufficiently appears in the moving papers.

A justice of this court has no jurisdiction to make an order that a defendant, in a judgment in the *County Court*, appear before a referee and make discovery, &c, in relation to his property, where execution has been returned unsatisfied &c. Such order can only be made by the county judge (*Code*, § 292).

A motion to vacate such an order, made by a justice of this court, may be made either to the justice who granted it, or another (§ 324).

*Yates Circuit and Special Term, October 1850.* Motion on behalf of defendant Locy for an order vacating certain orders made by a justice of this court. The orders in question were made in an action in the County Court of Livingston county, in

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Blake agt. Locy.

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which judgment had been entered in favor of Blake agt. Locy, under title 9, chap. 2, § 292 and 298 of the Code. They bore date September 21, 1850, and recited that it appeared to the justice by the affidavit of Blake, that an execution against the property of Locy had been issued to the sheriff of the proper county upon the judgment rendered in the action, and returned unsatisfied. The first order required Locy to appear before a referee, &c. to make discovery, &c. The other forbid the transfer, &c. of the property of Locy not exempt from execution, &c., and enjoined Locy against interfering therewith, &c. Both orders were entitled in the Livingston County Court. The affidavits upon which the motion is founded, and the notice of motion, are entitled in the Supreme Court. They, however, intelligibly refer to the action and proceedings in reference to which the affidavit is made and the notice given.

The affidavit also stated facts going to show that the referee appointed was an unsuitable individual for such referee, on the ground of personal enmity between him and the defendant.

E. VAN BUREN, *for the Motion.*

J. V. VAN ALLEN, *Opposed.*

WELLES, Justice.—The objection that the affidavit and notice of motion are wrongly entitled, can not be maintained (*Code*, § 406). Neither do I think the objection that the notice does not point out the irregularity complained of can prevail. The objection to the proceedings in question is radical and goes to the jurisdiction of the officer before whom they were had. That in relation to the referee appointed by him is sufficiently pointed out. That objection, however, could not in any event be entertained on this motion. It should have been raised before the officer who made the order, and could only be brought before the court on appeal, provided his decision could be reviewed at all.

The objection that a justice of this court has no jurisdiction to make the orders in question, would seem to be unanswerable, provided it can be considered on this motion. Where the execution is issued on a judgment of the County Court, the order must

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Wilson agt. Robinson.

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be made by a county judge (*Code*, § 292). In this case the judgment was by the County Court of Livingston county. If the justice who made these orders had been referred to the provisions of the section cited, he would undoubtedly have declined acting.

I had doubts at first whether the application to vacate these orders should not have been made in the first instance to the officer who granted them; but upon examination am satisfied the present motion for that purpose may be entertained, and that under section 324 of the *Code*, either course would be regular. The motion is therefore granted with \$10 costs.

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### SUPREME COURT.

WILSON agt. ROBINSON.

A justice of the peace, before he is authorized to issue a warrant for the arrest of a person, must be satisfied upon the examination on oath of the complainant, that a *criminal offence* has been committed. And in the warrant, the accusation must be recited.

Where the answer to an action for false imprisonment, set out that the complainant counted out some money upon a desk, which he intended to pay to defendant, upon defendant's giving him a receipt therefor, which money the defendant suddenly took up and carried away, the complainant forbidding him, unless he gave a receipt, which was not given, *held*, on demurrer to the answer, that the justice of the peace had no authority or jurisdiction to issue a warrant for the arrest of the defendant. It did not appear that any criminal offence had been committed.

*Columbia Special Term, January 1851. Demurrer to defendant's answer.* The action is brought for false imprisonment. The answer contains two grounds of defence. 1. The denial of the material allegations of the complaint; and 2. That the defendant had made a complaint to a justice of the peace, upon oath, stating, in substance, that he had been called upon by the plaintiff, who had requested of him a certain sum of money, for which he was to execute to the defendant, *as the defendant supposed*, a receipt, expressing the receipt by him of the money, to the amount of \$131.30; that the defendant had counted out \$81 in cash, and had drawn his check for \$50, upon the Hudson River

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Wilson agt. Robinson.

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Bank, and while he was proceeding to count out the remaining sum, and while the \$81 of cash was lying upon the defendant's desk, the plaintiff proceeded to take the same, and, although the defendant forbade his taking it until he had executed the receipt, he did in defiance of the defendant, and contrary to his express command, take and carry away the money and check, and refused to give a receipt therefor; that upon the making of this complaint the justice issued a warrant, directing any constable of the county forthwith to arrest the plaintiff and bring him before the justice; and that, by virtue of such warrant, the plaintiff was arrested by an officer duly authorized to execute the same, and that this is the same act complained of by the plaintiff.

To the latter defence the plaintiff demurred for insufficiency, stating as the grounds of demurrer, that it did not appear by the answer that it had been charged upon oath before the justice, that any crime had been committed by the plaintiff, or that there was any intent on the part of the plaintiff to commit a crime; and 2, that the affidavit, set out in the answer, does not show either the commission of a crime, or any intent to commit a crime.

M. PECHTEL, *for Plaintiff.*

E. P. COWLES, *for Defendant.*

HARRIS, Justice.—It was not the intention of the framers of the Code, that a demurrer should be allowed to any pleading except the complaint. On the contrary, it was their purpose to confine the remedy of the parties against insufficient pleadings subsequent to the complaint, to a motion to strike out irrelevant or redundant matter. But in the revision of the Code, which was made in 1849, a demurrer was made applicable to other pleadings; whether wisely or not it may not be useful now to inquire. The effect of this change, in practice, certainly is, to produce in many instances, two hearings of the same case, when all the questions might as well, perhaps, have been disposed of at a single trial. Under the amended Code the plaintiff may demur to any one or more of the defences set up in the answer, stating in his demurrer the grounds thereof, and this demurrer, unless



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Wilson agt. Robinson.

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otherwise ordered by the court, must be disposed of before any issue of fact in the case can be tried. In the case under consideration, there is an issue of fact to be tried, involving the merits of the controversy. The question presented by this demurrer might well have been disposed of by the court upon the trial of that issue, and thus the delay and expense of two-trials, have been avoided.

The demurrer presents for decision the sufficiency of the defence set up by the defendant, founded upon the proceedings before the justice, upon which a warrant was issued for the arrest of the plaintiff. It is provided by law that whenever complaint shall be made to a magistrate, that a criminal offence has been committed, it shall be his duty to examine the complainant, on oath, and any witnesses who may be produced by him; and if, from such examination, it shall appear that any criminal offence has been committed, he shall issue a warrant, reciting the accusation, and commanding the officer to whom it shall be directed, forthwith to take the person accused of having committed such offence, and to bring him before such magistrate, to be dealt with according to law (2 R. S. 706, § 2, 3). To give the magistrate jurisdiction there must be a complaint that an offence has been committed. The party making the complaint must be examined, upon oath, and from such examination it must appear, to the satisfaction of the magistrate, that a criminal offence has been committed. Then, and not until then, he acquires jurisdiction of the matter, so as to authorize the issuing of a warrant for the arrest of the person accused of having committed the offence, in which warrant the accusation must be recited. In this case, there seems to have been an entire absence of all these elements of jurisdiction. The affidavit, upon which the proceedings were based, does not show that a criminal offence had been committed, nor does it appear that any one pretended that such an offence had, in fact, been committed. It does not appear that the justice was satisfied that any such offence had been committed, or that the plaintiff was accused of any criminal offence, either before the justice, or in the warrant issued by the justice.

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Masters agt. Barnard.

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Upon this state of facts, I must hold that the arrest was without jurisdiction, and, of course, that the defence to which this demurrer is taken, is insufficient. Judgment must, therefore, be entered for the plaintiff upon the demurrer, with liberty to the defendant to amend upon payment of costs.

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## SUPREME COURT.

MASTERS agt. BARNARD.

Where there is an issue of law and an issue of fact, joined in the cause, no judgment for costs can be entered in favor of the party who prevails upon the issue of law until the issue of fact is disposed of.

Accordingly where a judgment was entered in favor of the plaintiff for costs of a demurrer interposed to a part of a reply, leaving an issue of fact undetermined, held that the judgment was irregular, and on motion was set aside.

*Madison Special Term, June 1851.* Motion by the defendant to set aside a judgment entered in favor of the plaintiff for costs of a demurrer.

The plaintiff sued to recover on a promissory note for \$78·46, to which the defendant set up in his answer the defence of payment, and also other matters not necessary to state here.

The plaintiff replied, denying the allegation of payment, and alleging other matters in reply to the other allegations contained in the defendant's answer.

To a part of the reply the defendant demurred, leaving, however, the issue of fact as to the defence of payment undisturbed; the demurrer so taken to a part of the reply was argued, and decided in favor of the plaintiff.

The plaintiff thereupon applied to the clerk of Madison county to have his costs adjusted, and judgment entered for the amount thereof; and accordingly, judgment was entered for \$30·50, costs and disbursements, which the defendant now moves to set aside

ALFRED NICHOLS, *for Defendant.*

DAVID J. MITCHELL, *for Plaintiff.*

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Brokaw and Halsted agt. Bridgman.

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MASON, Justice.—There can be no doubt, in my mind, that the plaintiff was in error in entering judgment for costs upon the demurrer, while the issues of fact in the cause were undetermined.

The practice was settled under our former system and there is nothing in the Code that changes it in this respect (Williams ads. Wright, 1 *Wend. R.* 277; 6 *Cow. R.* 71; Osborn vs. Lawrence, 9 *Wend. R.* 445; The People vs. Feeter, 12 *Wend. R.* 480; 2 *Arch. Pr.* 286; 1 *Burrill's Pr.* 252; 5 *East R.* 261). These cases seem to settle the doctrine that where there is an issue of law and an issue of fact joined in a cause, no judgment for costs can be entered in favor of the party who prevails upon the issue of law until the issue of fact is disposed of. This judgment, therefore, must be set aside as irregularly entered, and if the plaintiff succeeds upon the issues of fact, then he will be entitled to insert the costs of the demurrer in the record; but if, on the contrary, the defendant shall succeed upon the issues of fact in the case, then the plaintiff will not be entitled to have his costs upon the demurrer. This is a new question of practice under the Code, and I think it is not a proper case, therefore, to impose costs, especially as this is the first time the question has been presented to me.

The clerk of Madison county will enter an order setting aside the judgment in this cause, but without costs.

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## SUPREME COURT.

BROKAW and HALSTED agt. BRIDGMAN.

Where notice of motion for a commission is served by defendant without unnecessary delay, and before notice of trial served by plaintiff, the defendant will not be charged with plaintiff's costs of preparing for trial.

But if his motion papers are served after notice of trial or unnecessary delay, he must offer to pay the plaintiff's costs up to that time, or he will be charged, on the motion, with the whole of plaintiff's costs of preparing for trial.

*Steuben Circuit and Special Term, May 1850.* Motion by defendant for a commission to examine a witness in Wisconsin.

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Brokaw and Halsted agt. Bridgman.

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Issue was joined on the 18th April last. Notice of the motion was served on the 6th inst.; afterwards the plaintiffs noticed the cause for trial at the present circuit, and the cause is upon the calendar of the present term.

F. R. E. CORNWELL, *for Defendant.*

F. C. DINNINY, *for Plaintiff.*

WELLES, Justice.—The papers on the part of the defendant appear to be regular, and the commission should go. The only question is whether the defendant should pay the plaintiffs' costs of noticing the cause for trial and preparing for the present circuit. The practice appears to have been settled before the Code, that where the defendant intends to sue out a commission, he must give notice of it before he receives notice of trial, or within a reasonable time after issue is joined, according to the circumstances of the case, and in that case such notice will stay the proceedings. If he waits till he receives notice of trial before he gives notice of the motion, he must pay the plaintiffs' costs up to the time of the notice of the motion, and must pay, or offer to pay them then, or he will have the whole costs of preparing for trial to pay, unless it appear that he has served his papers for the motion without unnecessary delay; in which case he will be excused from the payment of any costs (*Ives vs. Jones*, 1 *Wend. R.* 283; 1 *J. C.* 391; *Gra. Pr.* 1 *ed.* 485; 2d *ed.* 594).

I am not able to perceive any reason why the practice should not remain the same under the Code. There is nothing there in conflict with the rule.

In the present case the notice of trial was not given until after the notice of the motion was served, and there is no complaint of any unnecessary delay on the part of the defendant.

The motion is granted without the payment of any costs.



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Ellice agt. Van Rensselaer.

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## SUPREME COURT.

ELlice agt. VAN RENSSELAER.

*Interest* upon tax warrants, issued under the act to equalize taxation, can not be collected.

Where a judgment creditor, whose execution was junior to some of the tax warrants in the sheriff's hands, and older than others, *held*, that on a sale of defendant's property, under the tax warrants, the judgment creditor not desiring to advertise under his execution, *all* the tax warrants in the sheriff's hands must first be paid out of the proceeds of the sale, and next, the execution of the judgment creditor.

*Rensselaer Special Term February 1851.* Motion for an order directing the sheriff of Rensselaer to apply certain moneys arising from the sale of the defendant's property upon the execution in this cause.

The judgment in this cause was recovered and docketed in September 1848. In March 1847, the treasurer of the county of Rensselaer had delivered to the sheriff seven warrants, issued pursuant to the provisions of the "act to equalize taxation," directing him to collect \$1352.09, for unpaid taxes, and seven dollars for the expense of issuing the warrants. In March 1848, four other similar warrants were issued for the collection of \$558.40. In 1849 another warrant was issued for the collection of \$224.30.

By virtue of these warrants the sheriff seized and sold certain real estate of the defendant for \$2700. An execution having been issued upon the judgment in this cause, which on the 9th of September 1850, had been assigned to Robert Christie, jr. before the sale, the assignee immediately after the sale, and before the sheriff had made any application of the proceeds, demanded that the surplus moneys, after satisfying the amount of the warrants issued in 1847 and 1848, and before the recovery of his judgment, should be applied upon his execution. The sheriff refused to make such application, on the ground that he was authorized to collect interest upon the tax warrants. It also appears that when the sheriff was about to advertise the property for sale

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Ellice agt. Van Rensselaer.

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under the warrants, he proposed to Christie to advertise other real estate, upon which the judgment was a lien, to satisfy his execution, but that Christie requested him not to do so. The collection of the warrants issued to the sheriff had, for a long time, been delayed by injunctions restraining such collection. Before receiving notice of this motion, and immediately after the sale, the sheriff paid over to the county treasurer all the proceeds of the sale, except about \$75, retained for his fees.

R. CHRISTIE, JR. *for Motion.*

C. L. TRACY, *for Sheriff.*

HARRIS, Justice.—The right to collect interest upon an execution is wholly statutory. At common law no such right existed in any case. But the law to equalize taxation, under which the warrants in question were issued, is silent on the subject of interest. It authorizes the county treasurer to issue his warrant to the sheriff, commanding him to make, "*the amount of the tax*, together with one dollar for the expense of issuing the warrant. It is also provided that the sheriff shall proceed upon the warrant, in the same manner as is prescribed by law in respect to executions, and shall be entitled to the same fees for his services in executing the warrant (*Sess. laws*, 1846, p. 467, § 4, 5). There is nothing in the provisions from which it can be inferred that the legislature intended that interest should be collected. On the contrary, I think it was the obvious intention of the legislature that the same amount should be collected, as though the tax had been received by the collector. If interest can be collected at all, for the long period during which the payment of the tax was delayed, by reason of the injunction, it must be by way of damages to be recovered under the bond or undertaking executed when the injunction was obtained.

But I think the sheriff was right in applying so much of the proceeds of the sale as was necessary to satisfy the warrant whose lien was junior to that of the plaintiffs' judgment. When it was proposed to advertise under the plaintiffs' execution, the sheriff was requested not to do so. Under these circumstances

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Haines agt. Davis and Lansing.

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the sheriff was bound, I think, after satisfying the prior warrants, to apply the proceeds of the sale to the satisfaction of any other process in his hands by virtue of which he had sold. The sale was not made by virtue of the plaintiff's execution. The plaintiff still retained his right of redemption, which would have been lost had the sale been made under all the process in the sheriff's hands.

Nor do I think the payment of the proceeds of the sale to the treasurer, after the claim made by Mr. Christie, should protect him against an order for the proper application of the proceeds of the sale. After such a demand, if he chose to pay over the funds, he must be considered as having taken the risk of an erroneous application upon himself.

An order must be entered directing the sheriff, after first satisfying all the warrants in his hands at the time of the sale, together with his fees thereon, to apply the residue of the proceeds towards the satisfaction of the execution in this cause. Neither party is to have costs upon this motion.

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### SUPREME COURT.

HAINES agt. DAVIS AND LANSING.

The plaintiff may waive a jury and take an inquest before the court in a cause at the circuit, out of its regular order on the calendar, where the defendant does not appear.

*It seems*, that this should be done before the jury are discharged for the circuit.

*Niagara Special Term, February, 1851.* On the second day of the last Orleans Circuit Court an inquest was taken in this cause out of its order on the calendar. The defendants' counsel did not appear, and the plaintiff's counsel waived a jury. The cause was heard by the court without a jury, and a report made and judgment entered in favor of the plaintiff.

The defendants now move to set aside the inquest and judgment for irregularity, upon the ground that an inquest can not be

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Haines agt. Davis and Lansing.

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taken without a jury. If the application is not granted on this ground, they ask to be let in to defend on terms.

J. DEPUY, *for Defendants.*

F. J. FITHIAN, *for Plaintiff.*

SILL, Justice.—It has been several times decided that the practice of taking inquests at the circuit, was not abolished by the Code of Procedure (Anderson vs. Hough, 1 *Code Rep.* 50; Dickinson vs. Kimball, *id.* 81; Sheldon vs. Martin, *id.* 81; Jones vs. Russell, 3 *How. Pr. R.* 324). Provision is also made for taking inquests by the 12th rule.

It is said in behalf of the defendants that the word “inquest” implies an examination by a jury, and there can not, therefore, be an inquest without a jury. Some authorities are referred to tending to sustain this position. It can not be very important on this occasion to inquire into the derivation of this term, or to seek for its literal or technical definition. Whatever these may be, its meaning when applied to proceedings in a cause at a circuit court, is well understood. It is a trial of the issue of fact where the plaintiff alone introduces testimony. Usually in these cases the defendant does not appear, and the importance of a jury to him can not depend on the order, in regard to other causes on the calendar, in which his is tried.

It can not be supposed that the legislature intended to place the right to have a jury empannelled upon this unimportant circumstance.

What is called an inquest, when speaking of proceedings in a cause at a circuit, is within the statutory definition of the word “trial.” “A trial is the judicial examination of the issues, between the parties, whether they be issues of law or issues of fact (*Code* § 250).

Whether the cause is tried upon a regular call, or out of its order on the calendar, it is a judicial examination of the issues. The defendant not appearing, the proceedings are in both cases precisely the same; and a jury, under section 266 may be waived in either.



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Haines agt. Davis and Lansing.

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The defendants' counsel cites *Monell's Practice* (p. 176), and has probably been misled by it. According to that book, the practice which has been followed here is irregular. It says that a jury should have been empannelled. *Dickinson vs. Kimball* (*supra.*), is cited as authority for what is there said. Judge HARRIS, in that case says, that the plaintiff may waive a jury on an inquest if the defendant does not appear; but the cause must be moved before the jury are discharged from attendance at the circuit, "*so as to afford the defendant an opportunity, in case he appear, of claiming his right.*" In *Dickinson vs. Kimball*, the inquest was taken after the jury had been discharged, and this was the reason for setting it aside; not because a jury must necessarily have been empannelled if one had been present. The principle of that decision seems to be this: The defendant is entitled to appear at the taking of the inquest, and to cross examine the plaintiff's witnesses; and if he do appear, the inquest must be taken before a jury, unless it be expressly waived by him.

Where the plaintiff does not move the inquest before the jury are discharged, it does not follow that the defendant is not in attendance, up to the time of their discharge, for the purpose of asserting this right. His non attendance afterwards, when his appearance could not secure it to him is not to be construed, as in other cases, a waiver of a jury. There is sound reason in the rule laid down, by Mr. Justice HARRIS, but the present case is not within it.

The excuse for omitting to file an affidavit of merits, is not the most satisfactory, and I have doubts whether the defendants ought to be relieved. They, however, swear to merits, and on the whole, I have concluded to let them in to try the cause, on payment of the costs of the circuit, and of opposing the motion, and upon stipulating that the action be referred. The judgment, in the mean time, is to stand as security.

NOTE.—The foregoing decision was affirmed on appeal at the general term, held in Erie county in April 1851, before SILL, MARVIN, and HOYT, Justices.

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Lucas agt. Johnson and others.

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## SUPREME COURT.

LUCAS agt. JOHNSON AND OTHERS.

Where process in the nature of a fi. fa. was issued against several defendants to collect the costs ordered on the denial of a motion; and it appeared that one of the defendants had died previous to making the motion, which was nowhere noticed, either in the motion papers or process issued (which was against all), held, that the surviving defendants could not avail themselves of the objection, of such death, to set aside the execution.

A demand of the costs ordered on a motion is not necessary before issuing process in the nature of a fieri facias for their collection. The code does not regulate the manner of collecting such costs. They are therefore collected under the act of 1840, which does not require a demand.

*Ontario Circuit and Special Term, February 1851.* This case was an action of ejectment, in which the defendants recovered judgment for costs. On the third Tuesday in May 1850, at a special term held in Ontario county, a motion was made on behalf of the defendants, that the attorney for the plaintiff pay the costs adjudged against them, on the ground that the attorney was the owner of the alleged right of action; which motion was denied with \$10 costs, to be paid by the defendants to the attorney for the plaintiff. The order denying the motion, bears date July 10, 1850, and was served on the attorney for the defendants on the 23d of the same month. On the 22d January 1851, the plaintiff's attorney issued an execution in the nature of a writ of *fieri facias* against the personal property of the defendants, to collect the ten dollars costs of opposing said motion. No personal demand of said ten dollars was made of the defendants, or either of them. There were, originally, seven defendants; one of whom, Thomas Noble, died about the first day of May 1850. A motion is now made to set aside the execution.

CHAS. J. FOLGER, *for the Motion.*

JNO. C. STRONG, *Opposed.*

WELLES, Justice. The motion is made upon the grounds,

1st, That one of the defendants died before the execution was issued, and is, in form, against all, including the one who is dead; and

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Lucas agt. Johnson and others.

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2d. That no demand was made of the defendants personally, or either of them, before the execution was issued.

With respect to the first ground, I think it ought not to prevail. The motion, upon the denial whereof, these costs were ordered to be paid, was made after the death of the defendant Noble, and appears to have been made by the survivors in the name of themselves and their deceased codefendant, without noticing his death. The effect of the decision of the motion in relation to the costs, was to order the surviving defendants to pay the ten dollars. It was inoperative and void as to the dead defendant. His representatives do not complain of the execution, and the living defendants have no just ground to complain on the ground that in form it is against the one who is dead, as well as themselves. So far as it is against him, it is a nullity; as, upon his death, his personal property vested in his legal representatives, and could not be levied upon by virtue of any process against him. The question is without a precedent, and I feel at liberty to decide it upon the general reason and good sense of the case. It can not, it seems to me be likened in this respect to the case of an execution upon a judgment. Before the law of 1847, abolishing the process of attachment and substituting the *fi. fa.* in its place, and when a demand of payment was necessary in order to bring the party into contempt, it would have been competent to issue an attachment against one of several persons who were ordered to pay costs, &c.; otherwise, cases might arise, where the party entitled to the costs would be remediless, as in case where one of such persons could not be found to demand payment of him. If the necessary steps were taken to bring one of them into contempt, process might issue against him alone. I however think it would have been more orderly and formal in this case, to have issued the execution against the defendants who are living, without including the one who is dead. But I regard it the merest matter of form, and nothing which can, in the least, prejudice the rights of the defendants who are living, whose duty it was to pay the costs of the motion.

In the next place, was a previous demand necessary, in order to authorize the execution ?

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Lucas agt. Johnson and others.

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The act concerning costs and fees in courts of law and for other purposes, passed May 14, 1840, provides that all orders awarding costs upon granting or denying special motions, shall specify the amount of such costs; and where the order for the payment of costs, or any sum of money, upon a special motion, is not conditional, a precept to enforce payment of such costs or sum of money, may be issued without any demand or application to the court (*Laws of 1840, p. 333, § 15*). If this statute is not repealed, it is decisive of the question. I am not able to find that it has ever been, in terms, repealed. The 303d section of the Code comes the nearest to it. But that section no more repeals the above provision of the act of 1840, than it does the act of 1847, abolishing imprisonment for costs, and giving the process of execution against the personal property for their collection. The section of the code referred to, merely repeals "all statutes *establishing or regulating* the costs or fees of attorneys, solicitors and counsel, in civil actions." It does not, nor does the code any where, that I can find, interfere with or undertake to provide for or regulate the collection of the costs of motions, except it be § 315, which allows costs of motions, but does not provide for or regulate their collection. It has never been understood that the statutes referred to are repealed by the Code, any farther than they are inconsistent with, or superseded by its provisions (see § 471 of the *Code of 1849*).

Again; the act of 1847, after abolishing imprisonment for the non payment of interlocutory costs, ordered by the court to be paid, provides that process in the nature of a *fieri facias* against personal property, may be issued for the collection of such costs, *founded on such order of court* (*Laws of 1847, p. 491, ch. 390, § 3*). The *order of the court* is made the foundation of the execution or process in the nature of a *fieri facias*, and not the contempt of the party, in not paying the costs. I am, upon the whole, inclined to hold that a demand of payment, before issuing the process, in this case was not necessary. The motion is, therefore denied; but the defendants are excused from paying the costs of opposing the motion, on the ground that they were war-



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Smith agt. Reno.

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ranted in making it by what is said in *Monell's Practice*, 379 and 380; and by some expressions in the cases of *Buzard vs. Gross* (4 *How. Pr. R.* 23), and *Eckerson vs. Spoor* (*id.* 361). So far as those cases hold a demand necessary before the process can issue under the act of 1847, for the collection of costs, the decisions must have been made without reference to the act of 1840, above recited.

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## SUPREME COURT.

SMITH agt. RENO.

An injunction can only be granted or sustained upon *affidavit*, and where the complaint praying an Injunction is duly verified, it may be used to obtain or uphold an injunction. But where the complaint is not so verified, the party must rely upon the affidavit alone for obtaining or sustaining it.

It is no answer to a motion to dissolve an injunction that the defendant has violated it. (*The dictum in Krom agt. Hogan 4 Howard*, 225, asserting differently disapproved.)

Sufficient facts and allegations must be set forth to warrant the issuing of an injunction; that is, it must appear that the plaintiff has some interest in the premises; that the defendant is wrongfully in possession, and is committing an injury, &c.

The plaintiff will be entitled to an order to show cause, or an attachment, as the case may be, on showing a violation of an injunction by the defendant—notwithstanding the injunction may have been issued without the requisite facts appearing, and for that reason dissolved. It is not for the defendant to determine whether an injunction is properly or improperly issued. It is his duty to obey it while it exists.

*Albany Special Term, March 1851. Motion to vacate an injunction.* The action was brought to recover the possession of lands which the plaintiff claimed to own in fee. The complaint alleged that the defendant, being in possession, had been, and then was, “cutting, destroying, disposing of, and removing large quantities of growing and standing timber and wood from the premises, and had destroyed the fences thereon, and suffered them to go to decay. The plaintiff demanded, as a part of the relief to which he was entitled, an injunction to restrain the defendant

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Smith agt. Reno.

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from the commission of any further waste upon the premises. The complaint was not verified, but the plaintiff annexed thereto his affidavit, stating the object for which the action had been brought; that the defendant was in possession of the premises, and had been and still was, "cutting, destroying, disposing of, and removing wood and timber, standing and growing on the premises, and removing, tearing down, or destroying the fences erected thereon, and also tearing down, destroying and removing out-houses, and buildings standing and being on said premises, or some portion thereof. Upon this affidavit, an injunction was granted by the county judge, restraining the defendant from the commission of any waste upon the premises, or from cutting, &c. The motion to vacate the injunction was founded upon the complaint and affidavit upon which it was granted. The plaintiff produced affidavits showing that, notwithstanding the injunction, the defendant had continued the acts from the commission of which he had been restrained, and moved for an attachment.

J. H. RAMSAY, *for Plaintiff.*

T. SMITH, *for Defendant.*

HARRIS, Justice.—The plaintiff supposes that by showing a violation of the injunction on the part of the defendant, he can defeat the motion to dissolve it. In this, I think, he is mistaken. It is true, that a party who is in contempt, can not apply to the court for a favor. But he must have been adjudged to be in contempt before this rule can be applied to him. It is not enough to produce affidavits showing that the court might be justified in so adjudging. And, even after he has actually been adjudged to be in contempt, he has a right to be heard upon any matters of strict right. The rule only applies to matters of favor (2 Barb. Ch. Pr. 281-2). A remark is found in the opinion of the court, in the case of Krom vs. Hogan (4 How. 225), which has been relied upon in support of the position, that it is sufficient to defeat the motion to vacate the injunction, if it appear by affidavit that the defendant has violated it. There is a *dictum* in that opinion which seems to favor this position. But the

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Smith agt. Reno.

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decision of the case did not turn upon this point, and a reference to the authorities cited by the learned judge will show that he had inadvertently, failed to notice the distinction to which I have alluded. The motion may, therefore, properly be considered upon its merits.

The 219th section of the Code declares in what cases an injunction may be granted, and the 220th section prescribes the manner of establishing the facts upon which it is to be granted. It must appear satisfactorily to the court or judge, *by affidavit*, that "sufficient grounds exist therefor." All the facts necessary to establish the plaintiff's right to this remedy must appear by *affidavit*. Where the allegations in the complaint are verified by *affidavit*, it may be used for the purpose of obtaining or sustaining the injunction, but where, as in this case, the complaint is not so verified, the plaintiff must rely alone upon the facts stated in the *affidavit* upon which he obtained the injunction to support it. The facts which appear from the *affidavit* in this case, do not furnish sufficient grounds for issuing an injunction. All that appears is, that the defendant is in possession of the premises described, and has been and still is cutting, destroying, disposing of, and removing wood and timber standing and growing thereon. It does not appear that the defendant is wrongfully in possession, or that the plaintiff has, or claims to have any interest in the premises. The *affidavit* entirely fails to show that the defendant was committing or about to commit any act "the commission or continuance of which, during the litigation, would produce any injury to the plaintiff. The injunction was therefore granted without sufficient grounds appearing therefor, by *affidavit*; and the motion to vacate it must be granted with costs.

Notwithstanding this order, I think the plaintiff is entitled to a further order requiring the defendant to show cause why an attachment should not issue against him for the violation of the injunction. It appears from the *affidavits* before me, that the defendant, after the service of the injunction upon him, has continued to cut and remove the timber upon the premises; in fact, that he has entirely disregarded the injunction. It was not for

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King agt. Stafford and another.

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him to determine whether the injunction was properly granted or not. So long as it remained an order of the court, so long he was bound to regard it. The fact that it has now been dissolved, will furnish no protection to him for its violation, while it remained in force. The plaintiff is, therefore, entitled to an order requiring the defendant to show cause, at the next special term, why an attachment should not issue against him, as for a contempt, for the violation of the injunction.

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## SUPREME COURT.

KING agt. STAFFORD AND ANOTHER.

A judge at chambers, overruling a demurrer, as frivolous, and ordering judgment, but with leave to amend, is a decision which must be appealed from as a *judgment*, not as an order.

(*This agrees with the decision in Bentley agt. Jones*, 4 *How.* 335.)

*General Term at Canton, Sept. 1850.* PAIGE, P. J. WILLARD, HAND and CADY, *Justices*.

The defendants put in a demurrer to a complaint upon a promissory note which was overruled as frivolous on an application to a judge at chambers, and judgment ordered accordingly, but with leave to amend (*Code*, § 247). From this judgment the defendants appealed as from an order and not as from a judgment, and gave an undertaking accordingly.

T. V. RUSSELL moved to dismiss this appeal and to correct the record. He contended that an appeal as from an order does not lie in such cases (*Bentley agt. Jones et al.* 4 *How. Pr. R.* 335).

The plaintiff also asked leave to amend his record in relation to allowance of costs.

C. G. MYERS, *Contra*. This is a mere direction of a judge at his chambers, made in writing, and is not included in a judgment, and is therefore an order (*Code*, § 400). It is not a final determination of the rights of the parties (§ 245). In *Bentley*



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Mitchell agt. Weed and Weed.

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agt Jones, there were other issues undetermined, and the appeal was from a judgment upon part of the issues, and as from a judgment, so the remarks of Justice PARKER, as to the propriety of an appeal as from an order, were wholly supererogatory. There has been no trial of an issue of law or of fact, which must be at a circuit or special term (§ 251, 252, 255). Besides here is a conditional order. The leave to amend makes it conditional. It is not final.

By the Court, HAND, Justice.—We think this is clearly a judgment upon an issue of law, and not an order. It is true, the defendant had leave to amend, and if he did not, the plaintiff must have the amount assessed by the clerk upon notice. But the leave to amend did not make the judgment itself conditional, and not final. Nor is it interlocutory. It is the final action of the court in a cause, and every thing remaining to be done is merely ministerial. It is like certain decrees in chancery, which used to be deemed final, though directions were given, and a reference ordered to carry them out.

The motion must be granted. But as plaintiff asks a favor, and the question is somewhat new, neither party will have costs. Motion granted.

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## SUPREME COURT.

MITCHELL agt. E. WEED and W. W. WEED.

Where an attachment against a non resident is issued under the Revised Statutes and the property attached has been discharged on a bond given by the friends of the defendant in the attachment, such defendant is not a competent witness for the makers of the bond in a suit upon it; although not nominally a party to the action.

Nor can he be made a competent witness by a release from the makers of the bond upon which suit is brought.

*New York Circuit, October 1851.* This action was originally commenced by attachment against George Hurlburt, a non resident. The warrant of attachment was issued in August 1848,

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Aldrich agt. Lapham and others.

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directed to the sheriff of Erie county, by virtue of which he attached a vessel belonging to said Hurlburt. Elias Weed and William W. Weed gave their bond under the statute to discharge the vessel, suit was then commenced on the bond against the above defendants. On the trial, the defendants offered as a witness George Hurlburt, the defendant in the original attachment; the court excluded the witness. Defendants' counsel then tendered a release from the Messrs. Weed, and again offered Hurlburt as a witness, contending that he was divested of his interest by virtue of the release, that he was not a party to this action, nor the one for whose immediate benefit the action was defended. The plaintiff's counsel objected, and the question was argued as to the competency of the witness.

EDWARDS PIERREPONT, *for Plaintiff.*

A. F. SMITH and A. K. HOPKINS, *for Defendants.*

EDWARDS, Justice.—I think the witness must be excluded; he is not a competent witness, and can not be made so by a release from the defendants, under section 399 of the Code. I consider him inadmissible.

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## SUPREME COURT.

ALDRICH agt. LAPHAM AND OTHERS.

On the foreclosure of a mortgage, where there are infant defendants, the complaint must allege the requisite facts to show what the interests of the infants in the premises are; and then such facts in all cases must be sustained by legitimate proof, because they are never *admitted* in cases of infants.

*Erie Special Term, December 1850.* This is an action commenced for the purpose of foreclosing a mortgage executed by the defendant Lapham. There are other defendants, among whom are three infants; who, as the complaint states, "have, or claim to have, some interest in the mortgaged premises, or some part thereof." No reason but this, is shown for making

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Aldrich agt. Lapham and others.

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them parties, and it is no where stated whether such interest is paramount or subordinate to the mortgage. A guardian has been appointed and a general answer put in for the infants. The plaintiff moves on the pleadings the usual affidavits and report of a referee, for judgment. The report shows the execution of the bond and mortgage as alleged in the complaint but it shows nothing as to the rights and interests of the infant defendants in the land.

B. H. AUSTIN, *for the Plaintiff.*

D. TILLINGHAST, *for the infant Defendants.*

SILL, Justice.—This application must be denied. The rule applies now as heretofore, that the judgment must be "*secundum allegata et probata.*" The complaint must state the facts which entitle the plaintiff to his judgment, and where they are not admitted, which as against infant defendants, is never the case, they must be sustained by legitimate proof. In the present case both these essentials are wanting. The complaint alleges that the infant defendants have an interest in the mortgaged premises, but it does not state what that interest is, whether it is paramount to the interest mortgaged or subordinate to it. The latter must be in some form shown by the complaint to justify the judgment prayed. If the complaint were sufficient in this particular, proof to show the paramount interest and rights of the plaintiff is wanting, and on both grounds the motion must fail.

The cause must stand over, to give the plaintiff an opportunity to move for leave to amend the complaint and if notice of such motion is not served within twenty days, the complaint must be dismissed with costs to the defendants who have appeared

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Alger agt. Scoville and others.

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## SUPREME COURT.

## ALGER agt. SCOVILLE, CLAPP, WELLS, CHAPIN, AND THE DUTCHESS COUNTY IRON COMPANY.

Where the complaint contained allegations of facts, and demanded judgment against the several defendants, substantially as follows: against Scoville for \$4000 and interest (being the amount of certain notes of the Dutchess County Iron Company, upon which plaintiff was endorser and had paid; and which he alleged Scoville was under an agreement to pay); that Clapp may be removed as assignee of the said company; that a receiver of the property of the company may be appointed and the same appropriated to the payment of the company's debts. And if there be any deficiency that the said Scoville may be adjudged to pay such deficiency, on all debts contracted on or before the 15th day of December 1849. (Wells and Chapin, the other defendants, being stockholders, with Scoville, were claimed to have an interest adverse to the plaintiff.)

*Held*, that judgment must be rendered for defendants on demurrer. *First*. Because the causes of action are some of them against a trustee, and others on contract: *Second*. Because the pursuit of the property of a debtor and demand of a receiver can only be founded on a judgment; and *Third*. Because the complaint contains distinct causes of action, in some of which some of the defendants are not interested.

If different causes of action can all be included in one of the classes mentioned in § 167, is it sufficient, where some of them might also be included in another class? It is not. Why? Because a legitimate construction of § 167 will not permit the joining of causes of action which belong to more than one class. And the last clause of that section says: "But the causes of action so united, must all belong to one *only* of these classes," &c.

*It seems*, that the Code does not contemplate the union of a cause of action triable by the court, with one triable by a jury, although there is no express prohibition against it.

*May General Term, 1851—Before MORSE, BARCULO and BROWN, Justices.* This suit was commenced by the service of summons and complaint on the defendants, Scoville, Clapp, Wells, and the Dutchess County Iron Company, on the 20th April, 1850.

The defendants, Scoville, Clapp, and the Dutchess County Iron Company appeared by William Eno.

The defendant Wells, appeared by William Stewart Eno.

The defendant Samuel C. Scoville demurred to the complaint. His demurrer was served May 4, 1850.



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Alger agt. Scoville and others.

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The defendants, the Dutchess Co. Iron Company and Daniel S. Clapp, also demurred to the complaint. Their demurrer was served May 4, 1850.

The defendant Moses Wells also demurred to the complaint. His demurrer was served May 4, 1850.

On the 4th of May 1850, a demand was made on behalf of the defendants who appeared, that the place of trial be changed to Dutchess county, which was acceded to by notice served on the 11th of said May.

The issues of law were tried at a special term held at Poughkeepsie, by Mr. Justice BARCULO, on the 27th of June 1850; and on the 8th day of July 1850, judgment was rendered for the defendants respectively, on the demurrers.

Judgments were entered thereupon on the 18th day of September 1850, with the clerk of Dutchess county, against the plaintiff, in favor of the defendants Scoville, Clapp and the Dutchess County Iron Company, for \$94·96, and in favor of the defendant Moses Wells for \$94·96.

The plaintiff on the 27th of September 1850, appealed to the general term from both of the said judgments.

The following is an abstract of the pleadings. The complaint showed,

*First.* The formation of the Dutchess County Iron Company, under statute of the 17th of February 1848, authorizing the formation of incorporations, to be located at North East in that county; capital stock of the company to be \$25,000, to be divided into 250 shares of \$100 each.

*Second.* That the original stockholders were Duncan J. Perry, who took 62, Moses Wells, who took 63, Phineas Chapin, who took 42, and the plaintiff, who took 83 shares; and that in the summer of 1849, Perry transferred his 62 shares to plaintiff.

*Third.* That on the 13th of December 1849, plaintiff sold and transferred his 145 shares to defendant Scoville, who assumed plaintiff's rights and liabilities in respect to such shares. That it was agreed between plaintiff and Scoville, that plaintiff should transfer to Scoville said shares, and also a claim of plaintiff against the said company for \$3,350; that Scoville should con-

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Alger agt. Scoville and others.

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vey to plaintiff a farm in Monroe county New York, with the utensils and stock thereon, and should guarantee to plaintiff the payment, as they became due, of all the notes of said company, which had been endorsed by plaintiff, and should indemnify plaintiff against all engagements or liabilities incurred by him for said company, or by reason of his having been a stockholder; that plaintiff performed his part of said agreement, by transferring to Scoville said stock and claim, and getting a note for Scoville from the company for the claim.

*Fourth.* That there were at the time outstanding the following notes of the company endorsed by plaintiff:

One of \$1,000, dated August 15, 1849; one of \$800, due about the last of December 1849; one of \$500, dated 10th of September 1849; one of \$1,000, dated September 25, 1849; one of \$1,000, dated October 11, 1849; one of \$500, dated 1st November 1849; all payable four months after date; and on the 13th of December 1849, plaintiff received from the company their note for \$564.51, payable on demand, for balance of book account, due from company, after deducting the claim of \$3.350, so transferred; on which note of \$564.51, \$142.79 remains due, according to the account annexed to the complaint.

*Fifth.* That the company have paid none of said notes; that upon the maturity of the note dated August 15, 1849, at Scoville's request, and on his promise to repay plaintiff in a few days, plaintiff took it up; that Scoville took up the \$800 note, but he has taken up none of the others; that plaintiff being charged as endorser thereon, has taken up and paid all the others, giving notice thereof to Scoville, and requiring him to refund, which he has neglected to do.

*Sixth.* That the company stopped payment January 24, 1850, and entirely ceased manufacturing on the 6th March 1850.

*Seventh.* That, as plaintiff is informed and believes, on the 24th January 1850, they made an assignment to Daniel S. Clapp, of Salisbury, Connecticut; a person irresponsible, ignorant of the iron business, and incompetent to act as assignee. States on information and belief the company's debts to be about \$30,000,

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Alger agt. Scoville and others.

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of which a part were contracted since the 13th day of December 1849, and their assets to be about sufficient to pay them if carefully administered by a competent person, but not otherwise; and states plaintiff's account with the company, annexed to the complaint, to be a true account.

*Eighth.* States on information and belief, that Wells and Chapin are insolvent. Demands judgment against Scoville for \$4,000 and interest; removal of Clapp as assignee; appointment of a receiver of the company's property, and the appropriation of the same to the payment of its debts; and that Scoville be adjudged to pay deficiency on debts contracted since December 13, 1849, if there should be a deficiency.

Plaintiff's account with the company is annexed to complaint, and is part of the judgment roll.

The defendant Scoville demurred to the complaint, and specified the following grounds of demurrer:

1. Scoville's indemnity or guaranty is void, not being in writing.
2. That complaint does not show that plaintiff had incurred or would incur any individual liability for the company by reason of his having been a stockholder, or in respect to the stock transferred to Scoville.
3. That complaint does not show that any debts contracted by the company before plaintiff's transfer to Scoville, were binding upon plaintiff individually, by reason of his being a stockholder, or on account of the shares held by him, and that plaintiff's demand for judgment against Scoville for any deficiency on debts contracted before such sale, is unsupported by any facts showing his liability.
4. That Scoville, Wells, Clapp, and the company are improperly joined in one action—the causes of action, and the relief against each being separate and distinct.
5. That the complaint improperly unites several and distinct causes of action; one against Scoville, one against Wells, and one against the company and Clapp, which can not be so joined.
6. That sufficient facts are not stated to constitute cause of action against Scoville.

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The following grounds of demurrer were specified by the company and Clapp.

1. That complaint shows no judgment recovered against the company by plaintiff.

2. It does not demand a money judgment against the company.

3. That sufficient facts are not stated to authorize the court to set the assignment aside and appoint a receiver. No fraud in the assignment is shown, or mismanagement on the part of the assignee.

4. It shows no fact establishing the assignee's incompetency.

5. That the company and Clapp have been improperly joined with Scoville and Wells in one action, alleging that the cause of action and relief demanded against each are distinct.

6. That the complaint improperly unites distinct causes of action—one against the company and Clapp, one against Wells, and one against Scoville, which can not be done.

7. And that it does not show sufficient facts to constitute a cause of action against the company and Clapp.

The following grounds of demurrer are specified by defendant Wells:

1. That complaint states no fact which fixes individual liability on defendant Wells, or entitles plaintiff to any relief against him individually.

2. That Wells's liability from the complaint, if any, is as a member of the company, and he should have been sued as such in his corporate capacity.

3. That the causes of action against Wells, Scoville, Clapp, and the company, are separate; that they have been improperly joined.

4. That the complaint improperly unites several distinct causes of action—one against Scoville; one, if any, against Wells, and one against the company and Clapp; and

5. That sufficient facts to constitute a cause of action against Wells are not stated.



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Alger agt. Scoville and others.

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## PLAINTIFF'S POINTS ON APPEAL.

This is an action to obtain payment of a debt due to the plaintiff by the Dutchess County Iron Company. The company having executed an assignment of all its property to Daniel S. Clapp, he is made a defendant because he has a fund for the payment of the debt. The other defendants are stockholders, and are therefore made defendants as having an interest in the controversy adverse to the plaintiff; and one of them, Scoville, is also a guarantor of the debt, and for that reason, also interested in the controversy. The complaint has been dismissed, and two separate judgments entered and judgment rolls filed, for reasons stated by the judge at special term to be: First, because the causes of action are some of them against a trustee, and others on contract; Second, because the pursuit of the property of a debtor and demand of a receiver can only be founded on a judgment; and Third, because the complaint contains distinct causes of action in some of which some of the defendants are not interested. It is submitted that none of these reasons are well founded. There are, besides, two preliminary objections to the judgments.

*First.* Two distinct judgments, and judgment rolls in the same action and entered at the same time, are an abuse, for which there is no warrant in the law (*Code*, § 245, 281).

*Second.* Nor could there be a judgment entered up in favor of four of the defendants, without a disposition of the case, as to the defendant Chapin (*Code*, § 274).

Independent of these objections, the judgment is erroneous for the following reasons:

*Third.* The objection that the complaint is demurrable, because the causes of action are, some of them, against a trustee, and others on contract, has not the least foundation. The causes of action all arise out of contract, express or implied. The obligations of the trustee all grow out of his undertaking as such. If the causes can all be included in one of the classes mentioned in § 167, that is enough, though some of them might also be included in another. Any other construction would lead to the grossest absurdities; as, for example, that claims to recover real

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and personal property could not be united, though arising out of one contract; nor claims against a trustee to recover either real or personal property.

*Fourth.* The objection, that the pursuit of the property of the debtor and demand of a receiver can only be founded on a judgment, is an entire mistake. When the creditor has no specific interest in the property, then a judgment is necessary to give him an interest or lien. But when there is a trust, his right attaches as a beneficiary under it, and he can always enforce such without a judgment (*Innes vs. Lansing*, 7 *Paige*, 583).

*Fifth.* The objection that the complaint contains distinct causes of action, in some of which, some of the defendants are not interested is also untenable. There is but one cause of action, and that is the debt due by the company to the plaintiff. The other defendants are all affected incidentally. The company is made a defendant because it is the principal debtor; Mr. Clapp, because he is the assignee and holder of a fund for the payment of the debt: Messrs. Scoville, Wells and Chapin, because as stockholders they have an interest in the controversy; and Mr. Scoville also, because he is an indemnitor as to the whole or nearly the whole of the debt. *The rule is this: any person may be made a party who has or claims an interest in the controversy, or is affected by the cause of action, or without whom there cannot be a complete determination of the questions involved in the case* (*Code*, § 118, 122, 167). The cause of action here being the company's debt, and the controversy being about its payment, the question respecting each defendant is this; is he interested in, or affected by, the payment of that debt, or without him can there be a complete determination of the questions involved. In considering this question, we look beyond the demand for relief, to the body of the complaint. Is there a cause of action set forth, and if so, what relief can be given upon it (*Code*, § 144, 275). The complaint shows an indebtedness of the company to the plaintiff. For that, judgment can be given against the company. Clapp, the fund holder, is interested or affected, otherwise an assignor or assignee could never be joined. Scoville, the guar-

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Alger agt. Scoville and others.

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antor, is interested or affected, otherwise a principal and surety could never be joined. Wells and Chapin, stockholders, are interested or affected, otherwise, a trustee and beneficiary could never be joined (6 *John*. 139; 4 *Cow*. 682; *Story Eq. Pl.* 169, 207, 284, 285; *Code*, § 118, 124; *Many vs. Beekman Iron Company*, 9 *Paige*, 194; *Newland vs. Rogers*, 3 *Barb. Ch. R.* 434).

*Sixth.* That the three defendants first named in the title, are necessary parties, is perfectly clear; because, according to well settled principles, the controversy can not be finally ended without them (*Boyd vs. Hoyt*, 5 *Paige*, 65; *Smedburg vs. Whittlesey*, 3 *Sand. Ch. R.* 321).

*Seventh.* Whether Wells and Chapin be proper parties or not, the other three defendants can not raise the question. It is nothing to them, whether there is a good cause of action against other defendants or not. This was so under the former practice in equity, and much more is it so under the Code. It is no ground of demurrer that parties have been improperly joined. That is to be provided for in the judgment (*Code*, § 274; *Whitbeck vs. Edgar*, 2 *Barb.* 106; *Cherry vs. Monroe*, *id.* 618).

*Eighth.* Wells and Chapin are, however, proper parties. They have an interest in the distribution of the trust fund, in the hands of Clapp; and are entitled to be heard upon the question. Unless they were made parties, Clapp might have a second time to litigate with them the question whether he ought to pay the claim of the plaintiff. Without their presence the court can not make a complete determination of the controversy. Besides the stockholders may, in a certain event, be liable for the debts (*Laws of 1848*, 56, § 10, 18; *Cunningham vs. Pell*, 5 *Paige*, 607; *Kent vs. Lee*, 2 *Sandf. Ch. R.* 105).

*Ninth.* Whether the plaintiff is entitled to have Clapp removed as trustee, or a receiver appointed, is of no importance so far as the demurrer is concerned, because the demand for them is merely subsidiary to the main object; though if the allegations of the complaint be admitted, there is sufficient legal reason for both.

*Tenth.* The undertaking of Scoville is not within the statute of frauds. It is a contract of indemnity made to a surety, and

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upon a new consideration. It is an original, not a collateral undertaking (*Mercein vs. Andrus*, 10 *Wend.* 461; *Rogers vs. Kneeland*, 13 *Wend.* 115; *Barnum vs. Childs*, 1 *Sandf. Sup. C. R.* 60; *Man vs. Cusine*, 2 *Barb. Sup. C. R.* 294; *Elder vs. Warfield*, 7 *Harr. & John.* 391; *Burge, Suretyship*, 26). Besides, the agreement has been in part performed (2 *Story Eq. Juris.* § 759, 1522).

D. DUDLEY FIELD, *for Plaintiff.*

WM. ENO, *for Defendants.*

By the Court, BARCULO, Justice.—I am still of the opinion that the demurrers were well taken for the reasons assigned at the special term. But as the case has been argued before us with much force and earnestness, by one of the learned authors of the code, I will examine one or two of his propositions a little more fully.

The third point of the learned counsel claims that “the objection that the complaint is demurrable because the causes of action are some of them against a trustee and others on contract, has not the least foundation. The causes of action all arise out of contract, express or implied. The obligations of the trustee all grow out of his undertaking as such. If the causes can all be included in one of the classes mentioned in § 167, that is enough, though some of them might also be included in another.”

This proposition involves the construction to be given to section 167 of the Code. If the construction contended for is sustained, then it follows that a plaintiff may unite in one complaint, a claim upon a promissory note for the payment of a sum of money with a claim upon another contract to deliver a thousand bushels of wheat, and a claim for the specific performance of another contract to convey a farm, and a claim upon a fourth contract for the execution of a trust. I am unable so to construe the section in question. On the contrary, it seems to me quite clear that the terms of the section and the other provisions of the Code, as well as the settled principles of good pleading, are irreconcilable with the views of the learned expounding author.

The section (167) provides that the plaintiff may unite several causes of action in the same complaint where they all arise out of



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1. Contract express or implied; or
2. Injuries with or without force to the person; or
3. Injuries with or without force to property; or
4. Injuries to character; or
5. Claims to recover real property, with or without damages for withholding thereof, and the rents and profits of the same; or
6. Claims to recover personal property, with or without damages for the withholding thereof; or
7. Claims against a trustee by virtue of a contract or by operation of law.

To any one acquainted with the law as it stood prior to the Code, it is quite obvious that this section is mainly an embodiment of the rules of pleading as they existed, with some omissions and numerous imperfections. The first class includes the old action of assumpsit and debt upon contract and covenant. The second embraces actions of assault and battery, false imprisonment, &c. The third, refers to actions of trespass or case for injuries to property. The fourth, is confined to actions for defamation. The fifth, includes actions of ejectment, and perhaps, suits for a specific performance, although, for reasons hereafter adverted to, it is doubtful whether the two can be joined. The sixth embraces trover and replevin; and the seventh covers all cases of trust. It is also apparent that some actions, as suits for divorce, actions upon judgments, and actions for partition of lands do not fall within any of the classes.

A legitimate construction of this section will not permit *the joining of causes of action which belong to more than one class*. Although many actions for the recovery of real or personal property arise out of contract, still they are not to be united with a simple contract for the payment of money. Each subdivision must be interpreted with reference to the others, and the provision made in the fifth and sixth, for the recovery of real and personal property, to which title is given by contract, shows that the legislature did not intend to include those contracts in the first class. Otherwise many actions would fall under more than one head, and the different classes run into each other; and thus

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the object of classification would be defeated. Moreover, a party bringing an action to recover personal property claimed by virtue of a contract, might join with it a claim upon a promissory note, upon the ground of the contract, under the first class, or a claim for personal property tortiously taken, upon the ground that the first cause of action was under the sixth class; and, if it be true in law as in mathematics, that things equal to the same thing are equal to one another, a count on a simple contract to pay money might be joined with a count for personal property unlawfully taken. We have too much respect for the law makers to believe that they could have contemplated so great absurdities.

We have given what we consider to be a fair construction to the language of the section. But we are not left to the mere legal rules of interpretation. The last clause fixes the meaning in terms which can not be misunderstood, when it declares that "the cause of action, so united, must all belong to one only of these classes." This is equivalent to saying that every cause of action belongs to but one class, and expressly forbids the union of causes belonging to different classes. How it can be seriously contended, in the face of this provision, that a cause of action upon a simple contract for the payment of money, can be united with a claim against a trustee, or with a claim to remove a trustee and have a receiver appointed, as is attempted in this case, we are at a loss to conceive; especially when it is remembered that the seventh class expressly includes "claims against a trustee by virtue of a contract."

But it is said that our construction "will lead to the grossest absurdities." To this it may be answered, that we have no authority to strike out words from a plain enactment of the legislature to make statutes consistent; and while the word "only" remains in the clause no other interpretation is admissible. Moreover for the court to attempt to correct and reconcile the statutes would be an endless as well as dangerous task. This construction, however, does not lead to, but, as we suppose, avoids absurdity. If there is any absurdity, it consists in the idea of settling all the controversies that may exist, however numerous,

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between the same parties in an ordinary trial by jury. This we admit is excessively preposterous.

It was well remarked by Justice HAND in the recent case of *Boyce vs. Brown* (7 *Barb.*), that "all experience has shown that trial by jury is best adapted to direct issues." He might have added, that the issues must be not only reasonably simple but reasonably few in number. In this respect those who advocate the union of many causes of action in one suit, manifest their ignorance of the true nature of *trial by jury*. For, when it is remembered that the theory of jury trial requires twelve men to be unanimous upon a disputed point, and that they must attain that unanimity in regard to every issue submitted to them; that they usually take no notes of the evidence, and consequently can not always bring it to mind after they retire; that a disagreement as to one essential issue renders a new trial as to all, necessary; it requires but little experience to discover that the fewer and simpler the questions, the better they are likely to be decided; that a multiplicity of issues increases the chance of a disagreement; that in long and complicated trials the jury too often either look to the judge as a guide, or resort to those compromise verdicts which show that the real merits have been lost sight of. It may be safely said that singleness and simplicity in this respect are indispensable to the full enjoyment of the benefit of trial by jury.

But there are other sections of the Code inconsistent with the practice of uniting such claims as are attempted to be joined in this case. Sections 253 and 254 provide that issues of fact for the recovery of money only, or of specific real or personal property, *must* be tried by a *jury*, unless waived; and that all other issues are *triable by the court*. Although there is no express prohibition against uniting a cause of action triable by the court with one triable by a jury, it is obvious from the various provisions in relation to trials, verdicts and judgments, that such union is not contemplated; nor is it practicable, in our judgment. In the case before us, the plaintiff claims judgment for \$4000 against one of the defendants upon a contract of indemnity to which the

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others are not parties. If issue of fact be joined on this it *must* be tried by a jury, if either party wishes. In regard to another defendant the plaintiff charges that he is unfit to serve as a trustee, and prays that he may be removed and a receiver appointed of the estate. This is a matter triable by the court according to the Code; and, according to common sense and the nature of things, it can not be tried by a jury. Now there is no provision found either in the code or in the practice of the courts, for trying part of a cause in one forum and part in another; or part at one time, and part at another, where issues of fact only are joined. The clause in § 254 authorizing the court "to order the whole issue, or any specific question of fact involved therein, to be tried by a jury," applies only to actions triable by the court, and is analogous to the former practice in chancery. It has no application to actions which must be tried by a jury. In such actions all the issues of fact must be submitted to the jury at the same time. If, therefore, there was nothing else in the code to forbid the joinder of such causes of action, the fact that some of the issues of fact which may be formed, are to be tried by a jury, and others by the court, would seem to present a difficulty almost, if not quite, insurmountable.

But it is said that we must construe the Code *liberally*. This is a very common argument, and is not unfrequently urged by both parties; meaning thereby a construction in their favor, respectively. Section 159, however, defines the liberality which courts are to exercise as that *which promotes substantial justice*. To permit the joinder of causes of action separate and dissimilar in their nature, requiring different trials, is not the liberality contemplated by the law; for, instead of promoting justice, it would tend to confusion and uncertainty.

Nor is it by any means certain that such a mode of pleading if allowed, and if all the issues could be tried at once, would save expense to the parties, as is sometimes supposed. If the four causes of action first above named should be joined in one suit, and issues of fact formed thereon, it might very well happen that four different sets of witnesses would be required, coming from



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distant part of the state. This, of itself, renders it difficult for the parties to be fully prepared for trial, and hence causes are put off from term to term. Add to this, the increased length of the trial, the probability of a disagreement of the jury, or of errors of the court requiring another trial, and it will be seen, by those who are capable of judging, that the advantage of trying numerous issues at once, in point of *economy*, are very questionable.

However this may be, there can be no doubt that the Code has hitherto utterly failed to fulfill the predictions of those who claimed that it would diminish the quantity or aggregate expense of litigation. On the contrary, our courts are, in some sections of the state, flooded with questions arising upon its new provisions or its unusual phraseology. Hundreds and thousands of cases are carried from court to court to settle the meaning of ambiguous or unintelligible language; and it is believed, notwithstanding the great increase of the judicial force of the first district, and its acknowledged ability and industry, that there are more causes now pending in that district alone, than there were in the whole state, at any time prior to the new system.

It is in truth greatly to be regretted, that those who assumed the responsibility of devising a remedy for the insufficiencies of the former system, did not more fully understand and appreciate the true cause and nature of the evils to be remedied; which arose mainly from a want of sufficient judicial force to dispose of the rapidly increasing business of a growing state and a commercial people. But in this age of progress, it not unfrequently happens, that alteration is mistaken for reformation, and the public feeling the necessity of some improvement, is too often contented with a mere *change*; not distinguishing, at first, between the benefits of a solid reform, and the crude innovations of conceited pretension.

Judgment for the defendants.

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## SUPREME COURT.

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Has the Code blended common law and chancery pleadings and moulded them into one system, so that now the same rules apply to all actions; or are different rules to be applied according to the nature of the action whether equitable or legal?

The constitution establishes a distinction between law and equity. The Code recognizes this distinction and provides a different mode of trial for legal and equitable actions. And it was the intention of the legislature to blend the modes of proceeding at law and in equity no further than was compatible with the preservation of both jurisdictions.

A mode of pleading which grew out of, and was indissolubly connected with, one form of trial, and one mode of relief, can not in the nature of things, harmonize with opposite modes of trial and relief. (SELDEN, Justice. *The reasoning on this question in the case of Rochester City Bank and Lester agt. Suydam and others*, 5 How. 216, adhered to).

What is a material issue? In common law actions it is one which is decisive of the cause. In equity, it is an issue upon a fact which has some bearing upon the equity sought to be established.

An equity pleading generally consists of an aggregation of facts and circumstances without logical dependency, but the accumulated weight of which is claimed to be sufficient to raise or defeat an equity.

If any of the rules of chancery pleading in respect to the statement of facts are to be retained in cases seeking equitable relief, how has the Code modified those rules?

A bill in chancery, formerly contained, first, the necessary allegations to put the court in possession of all the facts going to show both the plaintiff's right to relief, and what that relief should be; and secondly, to obtain through the admissions of the defendant, evidence to support the case.

The first of these principles of pleading has in no way been affected by any provision of the Code. Every reason which ever existed for a full statement of the case, obtains now.

But in regard to the second principle, the Code has made a change. Bills of discovery are abolished (§ 389). An equity pleading can now no longer be made use of for the purpose of examining the opposite party; and whatever is introduced with that view *alone* must be stricken out as redundant.

Can an answer, under the Code, be made to effect the purposes of a cross bill? By the true construction of section 149 of the Code, and a clause in § 263, the answer may contain whatever is *essential to the defence*, stated in a plain and concise manner, and nothing more; and if *upon the facts thus stated*, it should appear upon the trial that the defendant is entitled to any affirmative relief, it may be had.

Can any matters be stricken out as irrelevant and redundant, which under the former rule would not have been, as impertinent?

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All that is inserted in a pleading to be used as an examination may now be stricken out as redundant. Statements may be redundant which are neither impertinent nor irrelevant.

To an equity pleading now, may be applied the rule, that mere matters of evidence must not be pleaded; although in a sense somewhat different from that of the common law; not as confining the party to the statement of such facts only as are essential to the cause of action or defence, and upon which a material, that is a *decisive* issue may be taken; but as limiting his right to encumber the record with details which have no other bearing upon the case than to establish some other fact affecting the equitable right in controversy.

*Monroe Special Term, October 1851.* This is a motion by the plaintiff to strike out portions of the defendant's answer as irrelevant and redundant.

The action is brought upon the equity side of the court to obtain compensation in damages for the flowing of certain lands of the plaintiff, situated upon a stream called Little Black Creek, by reason of the defendant's mill dam, lower down upon the same stream; and for a perpetual injunction against such flowing.

The grounds of equity jurisdiction relied upon are; that the injury is a continuous one; that the plaintiff has already commenced four suits at law, in four successive years, commencing with the year 1843; that all these suits are defended, and not one of them has yet been brought to a final determination; and that new and additional suits will be continually required, unless the plaintiff can be permitted to establish his claim in this court, and obtain the aid of its equity powers to restrain the wrong complained of. The complaint contains forty-one folios.

The answer is very voluminous. It sets up a right to flow the lands in question, resting upon four distinct grounds:

1. That there was a separate written grant of the right, which is lost.
2. That it was conveyed as an appurtenance by the deed from the original proprietors and common source of title, to one of the defendant's grantors.
3. That it has become confirmed by twenty years adverse possession and use.

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4. That a parol license was given by the proprietors originally, which was executed by the erection of the dam and mill.

In addition to the facts necessary to show the different branches of the defence, which was set forth with minute particularity, the defendant has introduced into his answer a full history of the proceedings in the four suits at law, inserting the pleadings at length, together with two bills of exceptions, taken upon two successive trials of the first of the four suits, which contain the testimony given upon those trials, and averring that all the testimony given upon his part was true. He further avers that many of the witnesses are aged persons, likely to die before the controversy can be brought to a close; and also that he has discovered new and important testimony bearing upon some of the points in dispute, which he can not have the benefit of upon the trial at law of either of the four suits, for the reason that the parties have entered into a stipulation as to the facts upon which those suits are to be tried.

The answer also contains details of conversations between the parties, and of declarations by and negotiations between them and their counsel, intended to show good faith and proper motives in the litigation, on the part of the defendant, and the want of such motives on that of the plaintiff, which details are not claimed to be necessary or proper in the pleadings for any other purpose than as affecting the question of costs.

In conclusion, the defendant sets up and claims that he has a right under the code to insert in his answer not only all that is essential to his defence in the action, but any matter entitling him to affirmative relief; and that he may now have upon answer alone, all the relief which could formerly have been obtained by cross bill in a court of equity; and he insists that the pleadings and proceedings in the four suits, with all the details attending them, were properly inserted in the answer, for the purpose of having the benefit of the newly discovered evidence in the four suits at law, and of having those suits finally disposed of here upon the equity side of the court, and obtaining a judgment establishing his rights in the premises, and an assessment of his



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damages arising from the temporary injunction which has been allowed against him; and also for the purpose of perpetuating the testimony of the aged witnesses.

This is an imperfect sketch of the answer, but sufficient to present the legal questions to be passed upon. The answer contains in all, four hundred and fifty-eight folios.

H. HUMPHREY, *for Plaintiff*.

S. BOUGHTON, *for Defendant*.

SELDEN, Justice.—In that stage of transition through which the forms and modes of judicial proceedings are now passing in this state, there is nothing which occasions more just anxiety than the settlement of those rules and principles which are hereafter to govern parties in making their respective allegations. The science of legal pleading is broken up. Its foundations are now to be relaid, if there is any one who can meet the responsibility of acting judiciously upon the subject with unshaken nerve. I am not the man. It required great boldness to tear down this science; it requires almost equal courage to build up another in its place. But let each one whose duty it may become to aid in the erection of the new edifice, lay his block; and if found not to fit, let more skillful masons remove it and fill the vacancy with another.

The present motion presents several serious and important questions, which for the sake of perspicuity it may be well to state here. They are,

1. Has the Code blended common law and chancery pleadings and moulded them into one system, so that now the same rules apply to all actions; or are different rules to be applied according to the nature of the action, whether equitable or legal?

2. If any of the rules of chancery pleading in respect to the statement of facts are to be retained in cases seeking equitable relief, how has the Code modified those rules?

3. Does the Code authorize a defendant to insert in his answer facts not necessary to his defence, for the purpose of obtaining affirmative relief; and thus secure by the answer alone, all the benefit of a cross bill or cross suit?

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4. Does the rule of the Court of Chancery in regard to exceptions for impertinence, that the party excepting must succeed as to the whole exception, or fail as to all, apply to a motion in an equity case to strike out matters as irrelevant and redundant; and can any thing be stricken out as redundant, which would not have been as impertinent?

Upon the first of these questions I have already expressed an opinion in the case of the Rochester City Bank and Lester agt. Suydam and others (5 *How.* 216); but as two of my associates have come to a different conclusion upon the same point, I feel called upon to review my reasoning in that case.

It may now, I think, be considered as settled, that in a purely legal action under the Code, the common law rule which confined the allegations of fact in every pleading to such as were essential to the cause of action or defence; and which, if put in issue, would be decisive of the suit, is still in force; and that whatever is inserted beyond these essential facts, in such an action will be stricken out, on motion (Shaw agt. Jayne, 4 *How.* 119; Knowles agt. Gee, *id.* 317; Milliken agt. Cary, 5 *How.* 272; Williams agt. Hayes, *id.* 470).

In the two last of these cases the late Justice SILL and Justice HARRIS have respectively held, contrary to the opinion expressed by Justice WELLES in Shaw agt. Jayne, and by myself in the Rochester City Bank agt. Suydam, that the rule just stated applies no less to equitable than to legal actions; or at least that whatever is redundant in the one is equally so in the other.

Each of these learned justices rests his decision mainly upon the ground that it was the intention of the legislature in adopting the Code to abolish all distinction between common law and equity pleadings. How is this proved?

The constitution establishes a distinction between law and equity. The Code recognizes this distinction, and provides a different mode of trial for legal and equitable actions. Can the two jurisdictions be kept distinct, with different forms of trial and different modes of relief, and yet the same rules of pleading be in all respects applied?

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Nature has made some laws, and these it is difficult to repeal. No one can fail to see the relation which exists between trial by jury and compensation in damages for every injury. One is a necessary consequence of the other.

Could a jury adjust the equities and counter equities in a complicated case, and mete out the precise relief which justice might require? There is a moral impossibility in this. What twelve men would ever agree upon the terms of an equity decree?

Equally impracticable would it be for juries to find special verdicts in such cases embracing the details indispensable to be considered in making up the judgment of the court.

The agency of a jury, therefore, in the judicial process, is incompatible with the adaptation of the relief to the special circumstances of the case. Hence, compensation in damages for civil injuries, except in a few cases of proceedings in *rem*, was the only admissible mode of redress in the common law courts.

For similar reasons, issues to be tried by a jury were required to be single and decisive. Single, because double and complex issues would tend to embarrass and confuse, and lead to disagreement; and decisive, because otherwise no judgment could follow the finding.

Such issues could not be produced without rules adapted to that end. Hence we see the origin of some of the stringent rules of common law pleading.

It is thus, I think, made clear, that the form of trial by jury, the mode of compensation by damages, and the common law rules of pleading, all bore a natural and necessary relation to each other as cause and effect.

Here, then, is cause enough for the existence of the Court of Chancery. Compensation in damages being an utterly inadequate remedy in numerous cases, the prerogatives of the crown, and the principles of Roman jurisprudence were resorted to, for some other mode of redress in such cases. A court with ample equity powers was the result.

I repeat this reasoning here because, if just, the inference from it is inevitable.

To suppose that a mode of pleading, which grew out of, and was indissolubly connected with one form of trial, and one mode of relief, would equally harmonize with opposite modes of trial and relief, is, in my view, repugnant to sound reason.

The need of single and decisive issues to be tried by a jury, and of an expurgated record to produce them, and that of presenting the facts at large to a tribunal which is to adapt the relief to the special circumstances of the case, are antagonistical necessities, and that must be an ingenious mode of pleading which equally accommodates both.

I do not deny that it was the intention of the legislature to blend the modes of proceeding at law and in equity as far as was compatible with the preservation of both jurisdictions. But I insist that it would be unjust to the legislature itself to impute to it the design of abrogating differences which are inherent in the nature of things.

I will examine for a moment the *test* of redundancy which Mr. Justice HARRIS gives in Williams agt. Hayes, as applicable to *all cases*, and leave the point.

He says, that the criterion *in every case* is, whether the allegation in question can be made the subject of a *material issue*.

What is a "material issue?" Chitty says, "an immaterial issue is where a material allegation in the pleadings is not traversed, but an issue is taken on some other point, which though found by verdict, *will not determine the merits of the cause*" (1 *Chit. Pl.* 692).

Another writer defines an immaterial issue as "one which, passing by what is material in the previous adverse pleading, is joined on an immaterial point; that is a *point not decisive of the right of the cause*" (*Gould's Pl., chap. 6, § 27*). Of course a material issue is one which is decisive of the cause.

What has this rule to do with an equity case? It is an incident of the mode of trial in common law actions. The verdict of the jury must be decisive, or the court could give no judgment.

The allegations in a pleading at law consist of a *chain* of facts, all tending to establish some definite legal right. An equity



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pleading, on the contrary, frequently, if not generally, consist of an aggregation of facts and circumstances without logical dependency, but the accumulated weight of which is claimed to be sufficient to raise or defeat an equity.

If a single link be destroyed in the former the legal conclusion falls ; but if you abstract a fact from the latter, you have not *of necessity* broken a chain, but only diminished the weight of the whole. If you have taken enough out of the scales, the equity claimed will kick the beam; but not otherwise.

It follows from this that the term "material issue" can not be applied to an equity pleading in the common law sense, as an issue decisive of the whole case. A material issue in such cases is an issue upon a fact which has *some* bearing upon the equity sought to be established.

If the learned justice intends to apply his test in the common law sense to legal, and in the equity sense to equitable actions, then we agree.

Our second enquiry is, as to the extent to which the Code has modified the rules applicable to the statement of facts in an equity pleading. This question will be considered in its application to a bill or complaint, as the answer in this case is virtually a cross bill.

From what has been said here, and in the Rochester City Bank agt. Suydam, it must, I think, be apparent that there were two distinct reasons for the difference which formerly existed in the manner of making the allegations in a bill in chancery and a declaration at law. Those in the former were made more in detail. First, to put the court in possession of all the facts going to show both the plaintiff's right to relief, and what that relief should be; and, secondly, to obtain through the admissions of the defendant evidence to support the case.

The first of these reasons is in no way affected by any provision of the Code. Equity jurisdiction is retained. It is exercised upon the same principles and to the same extent as heretofore. The mode of trial is the same. The relief is adapted to the circumstances of the case. Every reason, therefore, which ever

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existed for a full statement of the case obtains now. But in regard to the second reason the Code has made a change.

By section 389, bills of discovery are abolished; but the section goes further and provides that no examination of a party shall be had on behalf of the adverse party, except in the manner prescribed in that chapter.

This last clause could not have been necessary to prevent a deviation from the provisions of the subsequent sections; it must have referred to some previous mode of examining a party on behalf of the adverse party. It would seem to have been aimed directly at the chancery practice of examining the opposite party by means of the pleadings.

It was natural and appropriate for the legislature to pass from the consideration of the examination of a party by bill of discovery in aid of *another cause*, to that of a similar examination in the *same cause*.

Besides, the term used is appropriate, and covers the case. A bill in chancery was described and treated of in the books as an examination of the defendant as well as a pleading.

I am forced, therefore, to the conclusion that an equity pleading can no longer be made use of for the purpose of examining the opposite party, and that whatever is introduced with that view *alone*, must be stricken out.

This brings us to the third question to be considered, to wit: Can an answer be made to effect the purposes of a cross bill?

It is settled, I believe, that an equitable defence may now be set up in the answer in an action purely legal, ejectment, for instance; but it is clear that in such an action the answer can not go beyond a defence and insert facts with a view to affirmative relief, for the conclusive reason that the mode of trial would be different. The defence must be tried by a jury; the claim to relief by the court.

But in equitable actions this objection does not exist. Are there any other? In *Averill agt. Taylor and Vernon* (5 How. 476), this question arose, but was not decided. There the answer was sought to be used virtually as a cross bill; and upon motion to

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strike out the prayer to that effect, Mr. Justice Cady, before whom the motion was made, refused to strike it out, declining, however, to express any decided opinion whether such a prayer could be granted upon the final disposition of the case or not. I might take the same course here; but as the answer in this case must be redrawn I deem it most judicious to pass upon the question.

Does the Code then authorize what is here claimed? Section 149 specifies what an answer must contain, to wit: First, a specific denial, &c. Secondly, a plain and *concise* statement of any new matter constituting a defence or set off, without unnecessary repetition.

Here is no authority for inserting any thing in an answer beyond what is essential to the defence or set off. But section 263 contains this clause: "If a set off established at the trial exceed the plaintiff's demand so established; judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief judgment must be given accordingly."

It is claimed that this cause impliedly authorizes the course adopted here. It would seem that so great a change in the practice ought to have some *express* authority.

The construction contended for would bring this clause in conflict with section 149, which purports to specify all which an answer may contain. Being in *pari materia* both sections must be construed together.

Besides, sections 153 and 154 require the plaintiff to reply to any new matter in the answer "constituting a defence or set off," and if he fails to do so the defendant may have judgment; but there is nothing in either of these sections, nor in any part of the Code, requiring him to reply to or answer any new matters seeking an affirmative relief. How is the defendant to enforce an answer to any such matter?

Again, a plaintiff may demur to a defence, or to one or more of several defences. Suppose a demurrer to a single defence, the facts constituting which are used in connection with other facts,

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as the ground of affirmative relief. Are the facts admitted for the purposes of the cross suit or not? Or may the plaintiff admit and deny the same facts upon the same record? Let us now look at the pleading upon which the question arises.

1. It sets up four distinct defences to the plaintiff's action.
2. It is a bill to bring four suits at law now pending, into this court upon its equity side to be disposed of.
3. It is virtually a bill of discovery.
4. A bill to perpetuate testimony.
5. An action for damages.

The object of the Code was to simplify proceedings; but this is not simplicity: it is confusion. Does it tend to clearness and precision in judicial proceedings thus to mix them up. The true construction of section 149 of the Code, and the clause in section 263, to which I have referred, taken together, I hold to be this: that the answer may contain whatever is essential to the defence, stated in a plain and concise manner, and nothing more; and if *upon the facts thus stated*, it should appear upon the trial that the defendant is entitled to any affirmative relief, it may be had.

The only question remaining to be considered, is in regard to the extent to which pleadings may be reformed, under the provisions of the Code, respecting irrelevant and redundant matter.

Formerly there was no adequate mode of curtailing prolixity in a chancery pleading. Exceptions for impertinence would not reach many cases of needless detail. The rule that facts and not evidence must be pleaded had no application. The party had a right to make his pleading an "examination" of his adversary. Of course he might insert his evidence in order to obtain an admission. If the matter was relevant it was not impertinent and could not be expunged.

The Code, however, affords the remedy required. The pleading can no longer be used as an examination. All that is inserted for that purpose, therefore, may be stricken out as redundant. Statements may be redundant which are neither impertinent nor irrelevant. We may now apply to an equity pleading the rule



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that mere matters of evidence must not be pleaded; although in a sense somewhat different from that of the common law, not as confining the party to the statement of such facts only as are essential to the cause of action or defence, and upon which a material, that is, *decisive* issue may be taken; but as limiting his right to encumber the record with details which have no other bearing upon the case than to establish some other fact, affecting the equitable right in controversy.

The old rule that a party excepting must succeed as to the whole exception, or fail as to all, does not apply with all its original force to a motion to strike out redundant matter. The rule had relation mainly to the question of costs.

The court has an interest in disencumbering the pleadings, and the effect of the Code is to invest it with a discretionary power over them. Special demurrers are abolished; and the more summary remedy by motion may now be made available to accomplish all that is desirable in regulating and reforming abuses in pleading.

As the answer in this case is not drawn in conformity to any one of the principles I have adopted, I shall order it to be stricken out entirely (a power which I think the court can properly exercise by combining its common law authority with that conferred by the Code), and shall allow the defendant forty days after notice of this order to put in a new answer. But as the rules on this subject are unsettled, I will allow no costs of this motion.

NOTE.—The reasoning in this case upon the subject of pleading accords with that in Shaw agt. Jayne, 4 *How.* 119; Knowles agt. Gee, *id.* 317; The Rochester City Bank agt. Suydam, 5 *How.* 216; and Alger agt. Scoville, *ante p.* 181. And is adverse to Milliken agt. Cary, 5 *How.* 272; Williams agt. Hayes, *id.* 470.

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Close agt. Van Husen.

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## SUPREME COURT.

CLOSE agt. VAN HUSEN, impleaded with E. McMARTIN and S. McMARTIN.

*It seems* that proceedings may be had against a defendant, when his last known place of residence was within this state, but his residence at the time can not on due inquiry, be ascertained by the plaintiff or his attorney.

*It seems* the act of April 12, 1842, chapter 277 (*L. of 1842*, p. 363), is still in force.

*Montgomery Special Term, Jan. 1851.* This was a motion in behalf of Van Husen, who had appeared, to dismiss the complaint, for unreasonable neglect on the part of the plaintiff to serve the summons on the other defendants; and was made under section 274 of the Code. From the motion papers on both sides it appears that the action was commenced prior to September 1848, and was an action, in the nature of a bill in equity by the plaintiff as assignee of a decree against the defendant Van Husen as trustee and executor of Hugh McMartin, deceased, for an accounting, the others defendants being heirs at law of the said McMartin, the deceased. The cause was put at issue between the plaintiff and Van Husen about the 6th September 1848, and has not been noticed for trial by the plaintiff. That the defendant Elizabeth McMartin, is an infant, and has not yet been served with process. That her last known place of residence was in this state, but the plaintiff after diligent enquiry can not ascertain where it is at present. That the case does not fall within any of the subdivisions of § 135 of the Code, and the plaintiff is unable, as he believes, to bring the said defendant into court, and asks the aid of the court in the premises.

C. PATTERSON, *for the Defendant Van Husen.*

P. POTTER, *for the Complainant.*

WILLARD Justice.—This case does not fall within any of the provisions of the 135th section of the Code, nor of the Revised Statutes (2 R. S. 186, § 122). Some of the embarrassments in

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cases where the residence of a defendant could not be found, occurred in *Jermain vs. Langdon* (8 *Paige*, 41); and in *Evarts vs. Becker* (8 *id.* 506); and it is probable that these and similar cases led to the passing of the act of April 12, 1842, p. 363, entitled "an act in relation to proceedings in the Court of Chancery against absent, concealed or non resident defendants, unknown owners in partition, and to the foreclosure of mortgages by advertisement." By the first section the following subdivision was directed to be added to the 122d section of the Revised Statutes, 2d vol. 186, *supra*, viz: "3 Where the last known place of residence was within this state, but his residence at the time can not, on due inquiry, be ascertained by the complainant or his solicitor." The case of the defendant Elizabeth McMartin falls exactly within this subdivision, and if the latter is still in force, the course to be adopted by the plaintiff, is sufficiently obvious. By force of the constitution of 1846 and the judiciary act of 1847 (*L. of 1847*, p. 323, § 16), the powers and jurisdiction of the Court of Chancery were vested in the Supreme Court. There can be no doubt, therefore, that at and before the time of the adoption of the Code, the act of April 12, 1842, was in full operation. The 468th section of the Code repeals all statutory provisions inconsistent with the Code; and expressly enacts that if a case shall arise, in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong, can not be had under that act, the practice theretofore in use, might be adopted as far as might be necessary to prevent a failure of justice. The first section of the act of 1842, *supra*, is not inconsistent with any provision of the Code. It supplies an omission without which the Code is defective. If both are permitted to stand, the system is harmonious, and there will be no failure of justice in a case like the present.

The plaintiff should present his application by petition, bringing his case within the 135th section of the Code, so far as form is concerned, and the first section of the act of 1842 (*L. of 1842*, p. 363, *supra*). The publication of the order should be in two newspapers to be designated as most likely to give notice to the

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persons to be served, and for a period of three months (compare *Code*, § 135 with *L. of 1842*, § 2, *sub. 2*). To enable the plaintiff to make this application, the present motion will be denied without costs, provided the said motion be made at the next special term of this court, to be held in Schenectady on the third Tuesday of July next; and if not then made, in that case the present motion will be granted with costs.

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## SUPREME COURT.

HOPKINS agt. EVERETT.

A demurrer will lie to a *denial* in an answer as well as to *new matter*.

The complaint alleged "that defendant assaulted the plaintiff, and seized him by his collar, and shook him violently." The answer "denies that he did assault the said plaintiff and seize him by his collar and shook him violently"; *held*, that this was bad pleading, under the Code. The answer grouped together all the charges on a general denial; so that defendant might have been guilty of two and not of one separately; whereas, if he intended to deny them all, he should have done so disjunctively.

*Putnam Special Term, September 1850.* This was a demurrer to an answer.

E. YERKS, *for Plaintiff*.

B. BAILEY, *for Defendant*.

BARCULO, Justice.—The counsel for the defendant is mistaken in supposing that a demurrer will not lie against a *denial* in an answer as well as to *new matter*. The word "same," in section 153 of the Code, refers to the word "answer," and not to "new matter."

I think, also, that the answer is insufficient. The complaint alleges that defendant "assaulted the plaintiff, and seized him by his collar and shook him violently." The answer "denies that he did assault the said plaintiff, and seize him by his collar, and shook him violently." The defendant has grouped three of the charges and denied them under oath in such a manner that if he



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should be guilty of two and not guilty of any one, his answer would not be literally untrue. This is not good pleading within the Code. The object of the special pleading, and the oath adopted by the code, is to require the defendant to admit so much of the charge as he can not conscientiously deny, and thus narrow the issue to those points which are really in controversy.

The denial in this case should have been of each charge disjunctively, if the defendant intended to put the whole of them in issue.

Judgment for plaintiff on demurrer, with leave to defendant to amend on the usual terms.

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## SUPREME COURT.

ANONYMOUS.

*Fulton Circuit, October 1851.* This was an action of slander; the slanderous words were spoken by the wife. Defendants for answer put in a general denial only. On the trial, defendants offered to prove the plaintiff's general character bad.

CADY, Justice—held that general character could not be given in evidence in an action of slander under a general denial.

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Robinson agt. Weeks.

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## SUPREME COURT.

ROBINSON agt. WEEKS.

A cause of action arising upon a tort for the taking or conversion of personal property which survives the party and goes to the executors or administrators, is assignable.

Such an assignment carries with it the assignor's title to the property converted and vests it in the assignee.

But the assignee can not maintain an action for the tort in his own name until after he has demanded the property.

The unlawful taking or conversion of personal property, gives the wrong doer no title. The title remains in the original owner or his assigns until judgment and satisfaction for the tort. (*The case of Gardner vs. Adams*, 12 Wend. 297 examined, and so far as it asserts a contrary doctrine overruled.)

A cause of action arising from a tort merely personal, as assault and battery, slander, and the like, is not assignable. Such causes of action die with the person, and no one has such a property or interest in them as forms the subject of sale or transfer, until after judgment.

Where the plaintiff in an action of tort, the cause of which is assignable, and while the action is pending, assigns the same, and judgment is subsequently obtained, and the defendant, without notice of the assignment, pays to the sheriff the amount of such judgment, upon executions in his hands against the nominal plaintiff under § 393 of the Code, such payment will not operate to discharge the judgment thus obtained, as against the assignee.

A defendant who volunteers to discharge other's debts, which he is under no obligation to pay, must see to it that he pays the debts of the person who is really his creditor, or he will not be protected. He pays at his own risk, of being right, where the payment is not directly upon his own debt.

*Seventh District General Term, Sept. 1851, Present, WELLES, SELDEN and JOHNSON, Justices.* The case is sufficiently stated in the opinion of the court.

WM. IRVINE, *for Plaintiff.*

GEO. T. SPENCER, *for Defendant.*

By the Court, JOHNSON, Justice.—This is an appeal from an order made at special term, denying the motion to set aside the execution issued in the above entitled cause.

The action was for the conversion of a certain amount of money in bank bills; and after the trial, but before the judgment was perfected, the plaintiff sold and assigned the judgment he

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might recover to his attorney in the action, as the affidavits show bona fide, and for a good and valuable consideration.

The judgment was perfected on the 10th of August, 1849, and on the next day the defendant, without any notice of the assignment, paid the amount to the sheriff of Steuben county on two executions then in his hands for collection, in favor of Daniel G. Smith against the nominal plaintiff.

The defendant's counsel insists that the plaintiff's attorney by the assignment to him acquired no title to the judgment for two reasons. First, that the cause of action was tort, and not assignable; and, second, that at the date of the assignment there was no judgment in existence; and the assignment gave no title to the judgment perfected afterwards.

To sustain the first ground, *Gardner vs. Adams* (12 *Wend.* 297) and *The People vs. Tioga Com. Pleas* (19 *Wend.* 73), are relied upon.

In *Gardner vs. Adams*, the court only held that a tort was not assignable so as to warrant an action in the name of the assignee, as the court expressly declare in *The People vs. Tioga C. Pleas*; and in the latter case it was held that a tort *merely* personal was not assignable, so that a court of law would protect the assignee against the subsequent fraudulent discharge of the judgment by the assignor. I confess I have never been able to see how the case of *Gardner vs. Adams*, upon the point relied upon, could be sustained upon principle, even if the court intended to go no farther than COWEN, Justice, says it did in *The People vs. Tioga Com. Pleas*.

For the purpose of deciding that point the court assumed the mortgage to be valid and free from objection, and *Gardner* to be a trespasser in causing the property to be levied upon and buying it in at the constable's sale. This being so, he acquired no title whatever to the property as against the mortgagee and his assigns. Nothing is better settled than that a trespasser acquires no title to the property he has unlawfully converted.

Even after action the title does not vest in the trespasser until after recovery of the damages and satisfaction. The property

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was levied upon in July, before the mortgage became due. The mortgage was assigned to Adams the 12th of August, two days after it became due, and the title to the mortgaged property had vested absolutely in the mortgagee. Prior to the assignment to Adams, Hard, the mortgagee, might at his election, either have brought an action against Gardner for the tort, or retaken his property.

He did not elect to bring his action but assigned the mortgage, which operated to transfer the title to the property to Adams, the assignee. Adams brought his action in March following, and the case shows that before suit he demanded the property of Gardner. Assuming the mortgage, therefore, to have been valid, there was nothing that I can perceive in the way of Adams maintaining an action in his *own* name. He had the title and the right of possession, and had demanded the property. The case on that point must have been decided upon the old English doctrine that a tortious taking of property changed the title, which has never been countenanced here. If nothing was assigned to Adams but the mere right of action for the tort, by the assignment of the mortgage, he must have brought his action in the name of Hard if he could have maintained it at all. But Hard had elected not to resort to his right of action, but to insist upon his title and sell it; and his assignee demanded the property and brought his action for the conversion in refusing to deliver it on his demand. It was not the case of the assignment of a tort, but of the sale and transfer of the title to personal property which another had tortiously taken.

I agree that Adams could not have maintained the action in his own name without a demand and refusal after he acquired his title; because until then, as to his right, there had been no unlawful interference with it (*Hall vs. Robinson*, 2 *Comst.* 296). The case upon this point is without principle or authority to support it and should be overruled. *HOYT*, Justice, in *Hall vs. Robinson*, in commenting upon this case says, if the demand by Adams was after the assignment, as the case I think clearly shows, "the decision can not be upheld either upon principle or authority."



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But in regard to the general doctrine of the assignment of torts. The case of *The People vs. Tioga C. P.* does not deny, but seems rather to concede that a tort for the taking or conversion of personal property may be assigned; and the case of *North vs. Turner* (9 *Serg. & Rawle*, 244), is cited with approbation, which expressly holds that such a claim may be assigned. It is a right which passes to an executor or administrator, and I think there can be no doubt that it may lawfully be assigned so as to vest the assignee with all the rights the assignor had at the time of the commission of the tort. The whole difficulty in regard to it seems to have arisen from not distinguishing between such cases and mere personal torts, as assault and battery, slander and the like, which die with the person, and which all the authorities agree can not be assigned.

It will be seen on a moment's reflection, that the two cases or rights of action, although both coming under the general classification of torts, have really little resemblance to each other. In the latter case there is nothing to assign but a mere injury, which does not survive the decease of the injured party, and in which no person can be regarded as having any property. While in the former the right and title to property of which the assignor is still undivested, goes with the assignment and vests in the assignee, or in the executor or administrator, on the death of the party against whom the tort was committed. I take it an assignment of the cause of action would necessarily carry with it the assignor's title to the property, because by prosecuting the action to judgment and obtaining satisfaction, the title becomes vested in the wrong doer and the purchaser must be regarded as acquiring the whole right by the assignment and authority to prosecute. The assignment of a bond merely carries with it by operation of law the mortgage, and draws after it the land (*Jackson vs. Blodgett*, 5 *Cowen*, 202; *Green vs. Hart*, 1 *John*. 590; *Martin vs. Mowlin*, 2 *Barr*, 978).

In the case of the death of a party whose property has been tortiously taken and who has not elected to bring his action in his life time, the title vests in the executor or administrator by

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operation of law, and he may bring his action for the original tort, or proceed and retake the property, as he may elect.

This view of the case answers the defendant's second objection to the assignment, that there was no judgment when the assignment was executed.

The assignment carried the whole title to the subject matter of the action, and of course to the judgment, when perfected. As between the parties to the assignment, clearly the whole right passed to the assignee, and the defendant the moment the judgment was perfected, became the debtor of the assignee and not of the nominal plaintiff. Nor was any notice to the defendant necessary except for the purpose of protecting the assignee against the acts of his assignor.

The defendant's counsel also contends that the payment to the sheriff on the two executions in his hands in favor of Smith against the plaintiff to the amount of this judgment, operates as a satisfaction and discharge of the same, even conceding the validity of the assignment, in as much as the defendant had no notice of the assignment, and the code authorizes such payments to be made by any debtor of judgment debtors.

The Code, § 393, provides that "after the issuing of execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as shall be necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge for the amount so paid."

The difficulty in the way of the defendant is that at the time of making these payments to the sheriff he was not in fact indebted to the judgment debtor, whose debts he volunteered to pay.

The nominal plaintiff here had at that time no debt or demand against the defendant, which he could enforce at law or equity. It will hardly answer, I think, to say that as he had received no notice of the assignment he had a right to regard himself as the debtor of the plaintiff, and is therefore to be protected. The Code, it is true, authorizes a debtor of the judgment debtor to pay the amount of his debt upon any execution against the latter in the sheriff's hands; but it does not make it his duty to do so.

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It imposes no obligation upon him whatever; and if a party indebted, instead of paying his debt to the person to whom he supposes himself indebted, and where he might learn the true state of the matter, chooses to go and pay another debt, which the law does not require him to pay, and to a person who has no opportunity of knowing whether or not he is really the debtor of the person whose debt he undertakes thus to satisfy, I think he does it at his peril. He must see to it that he pays *his creditor's* debt or the law will not protect him. He should be regarded as a volunteer, taking the risk of paying the right debt. Had the defendant paid to the nominal plaintiff the amount of the judgment and taken his discharge, without notice of the assignment, he would, without doubt, have been protected. Such payment and discharge would have been good against the assignee omitting to give notice of his rights. But the assignee in that case would have had his remedy against such nominal plaintiff by an action for a breach of the implied conditions of the assignment. Here, however, the party assigning has done nothing in violation of the assignment. The opposing affidavits show that the payments were made upon the executions against him without his knowledge or approbation and against his wish. The assignee, therefore, can not allege that the plaintiff has done any thing in violation of the express or implied conditions of the assignment, and consequently has no remedy upon the agreement. The assignor impliedly agrees in every assignment where it is not embodied in express terms, that he will not collect or discharge the judgment himself, nor interpose any obstacle to its collection by his assignee. But it would be going quite too far to hold that he impliedly undertakes to pay all demands that do then or may thereafter exist, against him before judgment and execution, and thus prevent all other persons from satisfying the judgment under this extraordinary provision of the Code. If these payments to the sheriff were to operate to discharge the judgment as against the assignee, this anomalous result would be produced. The assignee not only has judgment satisfied and discharged without any equivalent, but is deprived of all remedy against his assignor, while a third person,

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a total stranger to both the *real* plaintiff and the defendant in the judgment, who had no right or claim to it in law, or equity, or ethics, succeeds in collecting it and retaining the money without being liable to any one. It is clear that Smith, by no proceedings at law or equity, could have obtained the amount of this judgment against the assignee. A general assignment to a receiver under the order of the court, or the bankrupt or insolvent laws by the nominal plaintiff, would have given such receiver or assignee no title to the judgment as against the assignee, even without any notice whatever (Muir vs. Schenck, 3 *Hill*, 228). Smith had no equities as against the assignee. His executions were no lien upon the claim when assigned, and the assignee was not bound to take notice of them or inquire after them. This was held by WILLARD, Justice, in Countryman vs. Boyce (3 *How. Pr. R.* 386), as I think, correctly.

The assignee of judgments and choses in action, will be protected against executions in the hands of the sheriff.

The Code has not gone quite so far as to make judgments and executions issued thereon liens upon choses in action, or a notice equivalent to a *lis pendens*. The defendant has not paid the debt of the right judgment debtor, in this case, and the judgment still remains unsatisfied against him.

The order of the special term must, therefore, be affirmed.

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## SUPREME COURT.

SLOCUM AND WALKER agt. HOOKER AND ANOTHER.

Whether a contract between an *infant* and the party with whom he contracts, is to be regarded as absolutely void or merely voidable, any other person can not take advantage of the existence of such a contract, because it is sufficient to show that it was made with a person whom the law pronounces incapable of contracting.

Therefore an infant joint contractor or copartner may be disregarded entirely, and left out, in bringing an action against the contractors or firm.

*Rensselaer Special Term, February 1851. Demurrer to plaintiff's reply.* The action was brought against James H. Hooker



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and Pope Catlin, to recover damages for non performance of a special contract. The defendants, among other things, alleged that Richard H. Pattison at the time of making the contract was a copartner with them, and was, and still is, jointly interested with them in the contract. The plaintiff replied that Pattison was an infant, and the defendants demurred.

JOB PIERSON, *for Plaintiff.*

HIRAM P. HUNT, *for Defendant.*

HARRIS, Justice.—Whether the contracts of infants are to be regarded as absolutely void, or merely voidable, is a question which has been much discussed, and which, so far as it depends upon the discussions to be found in the books, is still left in great confusion. “The tendency of the modern decisions,” says Chancellor Kent, “is in favor of the reasonableness and policy of a very liberal extension of the rule, that the acts and contracts of infants should be deemed voidable only, and subject only to their election, when they become of age, either to affirm or disallow them” (2*Kent’s Com.* 235). It is also a general rule, that no one but the infant himself, can avoid his voidable contract. If, therefore, the contract of an infant be voidable merely, and the infant alone can avoid it, how can it be treated as void, until the infant has made his election to disaffirm it? If the contract is not void until the infant chooses to say it is void, then, indeed, the contract upon which this action is brought is not the contracts of the defendants alone, but Pattison, the infant, must be held to be a joint contractor with them. This reasoning would lead the plaintiffs into this dilemma. On the other hand if they sue all the contractors, they must fail in their action, upon a plea of infancy by one. This is the English rule. In *Chandler vs. Parks and Danks* (3 *Esp.* 76), Parks pleaded the general issue, and Danks pleaded infancy. The plaintiff entered a *nolle prosequi* as to Danks, and proceeded against the other defendant. Upon the trial he was nonsuited; Lord Kenyon holding that he should have discontinued, and brought a new action against Parks alone.

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The same doctrine was followed by Lord Ellenborough in *Jaffray vs. Freebairn and others* (5 *Esp.* 47), where it was held that the plaintiff having declared upon a joint contract, could not convert it into a sole contract, by discontinuing against one of the contractors, but that he ought to have declared on it as a sole contract from the beginning.

On the other hand, if they sue only the adult contractors, these will plead in abatement the non joinder of the infant joint promissor, and the action will be defeated. For then, it will be said, as it is said in this case, that infancy is a personal privilege, of which none but the infant himself can take advantage. Upon one horn or the other of this dilemma every party seeking to enforce a contract made by several parties, some of whom are adults and others infants, must be suspended, if the rules already stated, that the contract of an infant is only voidable, and that the infant alone can avoid it, are to be maintained without qualification.

In *Hartness vs. Thompson* (5 *John.* 160), the action was brought upon a joint and several note, made by Sarah Nelson, then a *feme sole*, and who, subsequently, intermarried with the defendant Thompson, and by Joseph Nelson. The latter pleaded infancy. Upon the trial the jury, under the direction of the circuit judge, found a verdict against Thompson and wife for the amount of the note, and in favor of Nelson upon the plea of infancy. The decision at the circuit was sustained, but Van Ness, J., in delivering the opinion of the court, says, "If the note had been joint, instead of joint and several, it is not easy to discover any method of enforcing payment against Thompson and wife, without making Nelson a party to the suit. Suppose in that case, the plaintiffs should bring a suit against the former only, it appears impossible to maintain the action in any other way, than by their showing the infancy of the latter. If this be so, it may be asked, whether it would not be unprecedented, to allow the plaintiffs to take advantage of the infancy of one of the parties to the contract, for the express purpose of enforcing it against the others, and whether such a procedure would not be a

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direct violation of the principle that infancy is a personal privilege of the infant and of which he only can avail himself." So that although in that particular case the plaintiffs were allowed to recover on account of the peculiar form of the contract, the very distinguished judge who pronounced the judgment of the court, evidently understood the doctrine to be, that the contract of an infant is only voidable; and until something has been done by him to avoid it, no one seeking to enforce it against other parties, is at liberty to disregard the infant as a contracting party. He therefore finds the holder of a contract in which an infant is a joint contractor with an adult, involved in the same difficulty which has been already noticed. This difficulty is, unquestionably, a legitimate consequence of the doctrine when fully carried out.

But I think the question may be relieved of its difficulty by a more close attention to the nature of the infant's contract. Whatever may be the effect of the contract as against the party with whom he contracts, is it true that the contract, as against the infant, is to be regarded as obligatory until it is avoided by him? The remarks of Mansfield, Ch. J., in *Burgess vs. Merrill* (4 *Taunt.* 468), upon this question, are exceedingly forcible and pertinent. "I never could understand," he says, "the doctrine that the contracts of infants are voidable only and not void. The cases are not intelligible, nor reconcileable to common sense. It is said, in some of the cases, that the infant may avoid the contract by pleading—that is, he pleads *it is not his contract*. Now, how is that a contract which does not bind a man? It is inseparable from the idea of a contract that it should be binding." The case in which these remarks are found, is itself directly in point, upon the question under consideration. It is twice reported. It first came before the court, under the title of *Gibbs vs. Merrill* and is found in 3 *Taunt.* 307. A bill of exchange had been accepted by the firm of Merrill and Le Blond. Merrill was sued as *sole acceptor* of the bill. He pleaded in abatement the non joinder of Le Blond. The plaintiff replied that *Merrill alone promised*. Upon the trial Le Blond was called as a witness, and proved that



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the bill was accepted by his firm; and that he, though an infant, had done nothing to rescind the contract. The plaintiff had a verdict. Upon a motion for a new trial, Mansfield, Ch. J., said, "Upon this plea in abatement, we can not say that the contract was not made by two persons. Therefore the verdict is wrong. According to the case in 2 *Vin. Ab.* p. 68, *tit. Actions, Joinder, D. d. pl. 8*, the plaintiff should have replied that the other joint contractor was an infant, and the defendant must either have admitted or denied it. A new trial was granted, and subsequently the replication was amended in conformity with the suggestion of the court. To the amended replication there was a demurrer, and upon this issue the case again came before the court in 4 *Taunt.* 468. In pronouncing judgment, Mansfield, Ch. J. says, "It is an extremely familiar doctrine, that all deeds and instruments operate to form a contract according to their legal effect. This, therefore, is a binding contract as to the adult, though void as to the infant. And it is extremely proper to say, that the plaintiff may safely overlook the privity of the infant, as to whom the contract is nugatory, and may describe it as a contract made by the adult contractor only."

My own conclusion is that, whatever may be the character of the contract between an infant and the party with whom he contracts—whether it is to be regarded as absolutely void or merely voidable, it may safely be asserted that when any other person seeks to take advantage of the existence of such a contract, it is sufficient to show that it was made by a party whom the law pronounces incapable of contracting. Of course, in a case like that now under consideration, the contract in question is not the less the sole contract of the adult defendants because another person has joined in it, who was not permitted by law to make such a contract. The inability to contract being established, he ceases to be a joint contractor. I am of opinion, therefore, that this action is well brought against the adult contractors only, and that the plaintiffs are entitled to judgment upon the demurrer.



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Nestle agt. Jones.

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## SUPREME COURT.

NESTLE agt. JONES, late Sheriff of Montgomery.

A sheriff sued under the Code, for an act done by him, and recovering judgment against the plaintiff, is not entitled to recover double costs. (*This agrees with Hallenbeck agt. Miller*, 4 How. 239; *Van Rensselaer agt. Kidd*, 5 id. 242, and a late decision of the Superior Court, N. Y. And is adverse to *Murray agt. Haskins*, 4 How. 263; *Chadwick agt. Brother*, id. 283, *Calkins agt. Williams*, 5 How. 393; and *Barber agt. Crossett*, ante p. 45.) The Code makes no distinction between public officers and private persons, with respect to the award of costs.

*It seems* that the extra allowance contemplated by § 308 is a convenient substitute for double costs.

*Schenectady Special Term, April, 1851.* This action was commenced in February 1849, and issue was joined therein in May following. It was brought against the defendant as late sheriff of Montgomery county, for not paying money collected on several executions as sheriff. The cause was noticed for trial at the Montgomery circuit in February, 1851, and was dismissed for the want of prosecution by the defendant, and the defendant now asks for double costs, according to the Revised Statutes (2 R. S. 617, § 24).

E. T. SCHENCK, *for the Motion.*

J. GENTER, *for Plaintiff.*

WILLARD, Justice—It was conceded that had this action been determined while chapter 10 of the 3d part of the Revised Statutes was in force, the defendant would have been entitled to the amount of his taxed costs, and one half thereof in addition (2 R. S. 617, § 24). It is contended on the part of the plaintiff, that that part of the Revised Statutes has been repealed by § 303 of the Code.

In *Murray agt. Haskins* (4 How. 263), Mr. Justice SILL held that § 24 and 25 of title 1, ch. 10 of the 3d part of the Revised Statutes were not repealed by the Code, and he allowed to a constable sued under the Code for acts done by him, by virtue of his office, where he recovered a judgment against the plaintiff,

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the costs allowed by the Code, and fifty per cent on that sum in addition thereto; and Mr. Justice WELLES, in Chadwick agt. Brother (4 *How.* 283), made a like decision in favor of a sheriff, sued for acts done by virtue of his office, and judgment rendered in his favor. On the other hand, Mr. Justice PARKER, in Hallenbeck agt. Miller (4 *How.* 239), in a case involving the same principle, held that double costs were no longer recoverable, the whole title of the Revised Statutes on this subject having been repealed by § 303 of the Code. This same doctrine was reasserted by the same learned Judge in Van Rensselaer agt. Kidd (5 *Howard.* 242).

It is difficult to conceive how "all statutes establishing or regulating the costs or fees of attorneys, solicitors and counsel in civil actions, can be repealed" without abrogating also the 24th section of title 1 of ch. 10 of the 3d part of the Revised Statutes. That section is a part of the statute which established and regulated the costs and fees of attorneys, solicitors and counsel. It is not denied that so far as the Revised Statutes give single costs, they are supplanted by the provisions of the Code; but it is argued that because the Code is silent upon the subject of double costs, the provisions of the Revised Statutes on that subject remain in force. I can not assent to this position.

The subject is scarcely susceptible of argument or illustration. It depends upon a *fact*, and not upon general reasoning. Neither single or double costs can be allowed, except as they are authorized by existing laws. There is no law awarding costs except the Code, which is entirely silent on the subject now in dispute. Provisions of the Code are apparently substituted for all the cases where costs were allowed before, in civil actions. To allow a different rate of costs to one class of persons, because they are not specifically mentioned and provided for in the Code, is a departure from the rules by which statutes should be expounded. The class of persons to whom double costs were formerly given, are embraced in the general provisions of the act; all are placed upon a par. Costs were not allowed at common law, and all statutes by which they are granted must be construed strictly

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They are in the nature of a penalty. It would be strange indeed, if single costs were abolished, and double costs suffered to remain. Single costs are the *unit*, by which the increased allowance is computed. The destruction of the unit, involves the destruction of its multiplier and parts.

The giving of the double and treble costs to the *party*, instead of the attorney, by the 25th section, does not alter the effect of the repealing clause in the Code. That section was adopted in consequence of the decision of the Supreme Court in *McFarland vs. Gary* (8 *Cow.* 253), in which it was held that the double costs, like the single, belonged to the attorney and other officers of court. That principle was repudiated by the Court of Errors, in the same case, decided in December 1830 (6 *Wend.* 297); but the court affirmed the judgment of the Supreme Court, on a ground not taken by the court below. In fact the Court of Errors held that the double costs belonged to the party, at whose expense the defence was conducted.

The 308th section of the Code affords a convenient substitute for the statute of double costs. In most cases where such costs were formerly allowed, the actions were difficult or extraordinary, or were unreasonably or unfairly conducted, in either of which cases the court can now indemnify the defendant by an extra allowance. Such allowance was made, in the present action, by the learned judge who tried the cause.

I concur fully with Mr. Justice PARKER in *Hallenbeck agt. Miller*, and *Van Rensselaer agt. Kidd*, *supra*. The motion for an increase of the costs, according to § 24 of ch. 10, title 1 of the 3d part of the Revised Statutes, must be denied. But as there are conflicting decisions on the question, and it had not before been raised in this district, it is denied without costs.

NOTE.—This case and that of *Barber agt. Crossett*, *ante p. 45* (which are adverse) should not have been published at present. The directions received from Judge WILLARD, that it would be better not to publish either of them, until the 4th District had settled the question, were forgotten when Judge HAND'S opinion (*ante 45*) was published. Having published one, it is proper, of course, to publish the other.

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Harris and others agt. Whitney and others.

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## SUPREME COURT.

HARRIS AND OTHERS, Commissioners of Highways, agt. WHITNEY  
AND OTHERS.

A return to a writ of certiorari made by Judges after they had gone out of office, held, valid. (*The case of Peck agt. Foote and wife*, 4 How. Pr. R. 425 so far as a different doctrine is stated, overruled.)

Where the judges of the late Common Pleas reversed an order of the commissioners of highways, on appeal (1 R. S. 518, §84 and 88), and it appeared that after the hearing before them, they did not confer together upon the matter, but had an understanding that they would meet for that purpose at a future time, which never occurred; but the order of reversal was signed by two of the judges at different times and places, held, that it was irregular. All the judges should have met for the purpose of determining the appeal, and then a decision of a majority would have been valid (2 R. S. 555, § 27).

*Chenango General Term*, 1851. MASON, SHANKLAND and MONSON, Justices. This case was brought into this court by certiorari to reverse an order of the judges of Broome Common Pleas, reversing a certain order of the commissioners of highways of the town of Vestal, laying out a highway in said town. The judges met, due notice having been given to all parties, and heard the appeal, and separated without making any determination of the matter, with the understanding that they should meet at a future day. They never met afterwards; but the order was made in the manner stated in the opinion below. The judges went out of office on the change from the old to the new system under the present constitution, before they had made their return. Their return has been made since they went out of office, and upon the argument of the cause, the defendants' counsel made it a point that the case could not be heard upon the return of the judges after they had gone out of office.

HOTCHKISS &amp; SEYMOUR, for Plaintiffs.

BIRDSALL &amp; BARTLETT, for Defendants.

By the Court, MASON, Justice.—There is no doubt that these proceedings were properly brought up here by certiorari (Lawton and others vs. The Commissioners, &c. of the town of Cambridge,



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2 *Caines R.* 179; Commissioners of Highways of the town of Kinderhook vs. Clow and others, 15 *J. R.* 537). The appeal from the decision of the commissioners of highways lay to any three judges of the Court of Common Pleas of the county in which such road was situated (1 *R. S.* 518, § 84 and 88), by any person aggrieved. The appeal was to any three judges, and the statute conferred a special authority upon the judges to hear and determine such appeal. The judges must all meet for the purpose of determining such appeal, and then a decision of a majority will be valid (2 *R. S.* 555, § 27; Woolsey and others vs Tompkins and others, 23 *W. R.* 324; Fitch vs. Com. of Highways of Kirkland, 22 *W. R.* 132; Downing vs. Rugar, 21 *W. R.* 178). There is no doubt that the judges erred in not meeting together to consider of the matters of said appeal. The judges, after having given due notice to all parties, heard the proofs and allegations of the parties interested in said appeal, and the arguments of their counsel on the 22d day of June, 1847. The judges then separated without having conferred together upon the matters of said appeal with the understanding that they should meet at some future day. They did not meet afterwards to consider of the matters of said appeal. The order which we are asked to reverse upon this writ of certiorari was drawn up by the attorneys of the appellant and signed by Judge Whitney at Binghamton, and then presented to Judge Kimball at Union, and there signed by him. It can not be doubted, I think, that this was an error, and one of such a character as requires this court to reverse it, or set it aside. Such an order is, to say the least, grossly defective if not a nullity. But it is said by the counsel for the defendant that the return to this writ is a nullity, as it was made by these judges after they had gone out of office, and that consequently this case can not be heard upon their return; and we were referred upon the argument to the case of Peck agt. Foote and wife (4 *How. Pr. R.* 425), as sustaining such a doctrine. Such is the decision in the case of Peck agt. Foote. That case came before Justice HARRIS on a motion to set aside the return to the writ made after the judge had gone out of office, and which

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motion he granted. This case of Peck agt. Foote has been fully considered by this court, and I believe we are unanimous in the opinion that the case is wrongly decided and ought not to be followed. It was expressly decided by the Supreme Court of Massachusetts upon a full consideration of the question in the case of Welch vs. Jay (13 *Pick. R.* 477, 481, 483), that at common law a public officer may make a valid return of what was done by him while in office, after his term of office has expired (see also Clerk vs. Wilkins, 1 *Salk. R.* 322; The King vs. The Sheriff of Middlesex, 4 *East. R.* 604). And it was decided by this court in the case of Green vs. Bates & Kent, M. S., that a sheriff who has executed an execution while in office, might make a valid return so as to authorize the filing of a creditor's bill after his removal from office. There is no doubt but we might require the return which is made in this case to be sworn to, or that we might hear it upon affidavits of the judges, stating the proceedings before them; but we think that where, as in the present case, there is no motion made to set aside the return, and no complaint but that it contains a faithful statement of the proceedings had before these judges, that it is entirely competent to hear the case upon their return, and I am of opinion that at common law this return is good. But this court can hear the cause without a formal return. It was held in the case of Clason vs. Shotwell (12 *Johns. R.* 31), that where a certiorari is issued to a justice of the peace to return the proceedings in case of forcible entry and detainer, and the justice dies before any return is made, that this court will hear and decide the case on affidavits showing the proceedings before the justice. And in the case of Seymour vs. Webster (1 *Cow. R.* 168), which was brought into this court by certiorari to review the judgment of a justice of the peace, and where the justice had died before he made his return, the court ordered the case to be heard in this court upon affidavits, requiring each party to serve the affidavits upon which they relied. This practice was allowed, it was said, to avoid a failure of justice. And I think, in the case under consideration, that there is no use to delay the judgment in this case to require the

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facts which are embraced in this return to be shown by affidavits. There is no complaint made that this return does not contain a truthful statement of the facts of this case, and as the parties have come to argue the case upon this return, I think we should decide the case. The order, therefore, must be reversed.

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## SUPREME COURT.

THE PEOPLE ex rel. THOMPSON agt. TOWNSEND AND OTHERS.

An affidavit entitled in the "County Court," for a motion for retaxation of costs, &c. in proceedings "for forcible entry and detainer," commenced before a county judge, and brought into this court by certiorari, comes within § 406, and is sufficient.

This court has jurisdiction to regulate the matter of costs in such a case, where from the papers it appears upon what principle they were adjusted by the county judge, and the notice of motion asks for sufficient relief.

Attorney and counsel fees can not be allowed in such proceedings. It is not an action brought in a court of record, within the meaning of the statute (2 R. S. 613, § 3).

*Ontario Circuit and Special term, February, 1851. Motion for retaxation of costs, &c.* A proceeding for forcible entry and detainer was instituted in behalf of the relator, before the county judge of Yates county, against the defendants, under art. 1, title 10, chapter 8 of part 3 of the Revised Statutes (2 R. S. 507, sections 1 to 23).

An inquisition was found by a jury, which the defendants traversed. Upon the trial of the traverse, the defendants were found guilty. The defendants then sued out a common law certiorari, removing the record of proceedings into the Supreme Court, which certiorari was quashed on motion of the relator. A bill of costs was afterwards presented by the attorney for the relator to the county judge for taxation, amounting to \$90.59, which included not only all the disbursements and officers and witnesses fees, but also regular fees for attorney and counsel, the same as if it had been an action in a court of record.

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The county judge excluded all the items charged for attorney and counsel fees, and taxed the bill at \$ 22.70, allowing nothing but officers and witnesses fees and postage. These proceedings before the county judge were all had since the Code of 1849 took effect. A motion is now made for a retaxation of the costs, or for such further or other rule, order or relief, as to the court shall seem proper to grant. The motion is founded upon an affidavit made by the attorney for the relator, setting forth the foregoing facts, which affidavit is entitled in "Yates County Court."

JNO. C. STRONG, *for the Relator.*

JAMES TAYLOR, *for the Defendants.*

WELLES, Justice.—Several preliminary objections are made by defendants' counsel to this motion, only two of which I shall notice. The first is that the affidavit is wrongly entitled. That there being no such action or cause pending in the county court of Yates county, the affidavit is a nullity, and perjury could not be assigned upon it. And it is contended that the case is not within § 406 of the Code, as § 471 excepts from its operation the proceedings under the act to prevent forcible entries and detainers.

I think, however, that § 406 applies to this affidavit. It is not made in the proceeding before the county judge, which is substantially at an end; but is made for the purpose of a motion at this court. That objection is therefore overruled. It is also objected that this court has no jurisdiction of this motion for retaxation of costs in a special proceeding before another court or officer. This is undoubtedly so; a motion for retaxation in such a case, I believe, was never heard of; at least none was successful. The notice, however, asks for any relief to which the relator may be entitled; and if the county judge has taxed or assessed the costs upon illegal principles, a remedy, if any exists, should be awarded. The judge has certified that he decided the counsel and attorney fees should not have been charged, and he has given us the items which he allowed, which shows that he excluded everything but officers and witnesses fees and postage. On sup-



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position that it is a proper case for the allowance of a common law certiorari, I shall proceed to examine the question on the merits of the motion. The question is whether in a proceeding under the statute entitled "of forcible entries and detainers" before a judge, the complainant is entitled to recover attorney and counsel fees, upon award of restitution in his favor.

If the jury of traverse find the defendant guilty, the judge shall award restitution, &c., "and shall assess the costs and expenses of the proceedings" (2 R. S. 509, § 12).

The next section directs an execution for possession, and for the costs. Section 14 provides for an award of restitution, &c., in case the inquisition be not traversed; and directs the judge in that case to "assess the costs and expenses of the proceedings." The relator in this case claims that he is entitled to a full bill of costs, including attorney and counsel fees according to the fee bill of 1840, as amended by the act 1844. He rests such claim on the 1st subd. of § 3 of tit. 1, ch. 10, part 3d of the Revised Statutes (2 R. S. 613). The section and subdivision in question read as follows:

• "§ 3. In the following cases, if the plaintiff recover judgment by default, upon confession, verdict, demurrer or otherwise, in any action or proceeding at law, he shall recover the costs allowed for services in the court, in which the action shall be brought; 1. In all the actions relating to real estate, enumerated in the fifth chapter of this act, *and in all the proceedings to recover the possession of land forcibly entered or forcibly detained.*" The other two subdivisions of the section provides for other cases.

It is contended that the case is within the express provision of this first subdivision, being a proceeding to recover the possession of land forcibly entered, &c.

There seems to me to be several difficulties in the way of the interpretation contended for. The legal proposition of the section in question, is contained in that part of it, preceding the subdivisions; and their office is to limit and apply the proposition or rule established, to the cases specified in the subdivisions. If this rule or proposition is seen to be inapplicable to the pre-

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sent case, it would seem to follow, that the case although within the language of the subdivision, is not within the spirit or intention of the section.

The section under consideration allows the plaintiff, in the cases mentioned in its subdivisions, to recover "the costs allowed for services in the court in which the action shall be brought." Here the bringing of an action in a court, is clearly contemplated, and the prevailing plaintiff is allowed to recover the costs allowed for services in such court. But what costs are allowed in the court in which these proceedings were had? if, indeed, they were had in a *court* within the contemplation of the section. The sections of the Revised Statutes allowing costs to attorney and counsel in courts of law were repealed by the act of May 14, 1840 (*Laws of 1840, ch. 386, § 40*), and a new rate of allowance to attorneys and counsel is in that act prescribed. It is confined by the first section to a "court of law"—"being a court of record." Suppose, then, we say the section of the Revised Statutes above referred to, were intended to embrace, among others, this identical case; how is it possible to give it effect so as to allow attorney and counsel fees? On such supposition the relator is to recover the costs allowed for services in the court in which the action shall be brought, that is, the court in which these proceedings for forcible entry and detainer have been brought. Was that a court of record? If it was not, there is no law allowing the charges for the services of attorney and counsel. But no one will pretend that the proceedings were in a court of record. The foregoing view seems to me to be fatal to the relator's claim. Besides, I do not think § 3 of tit. 1, ch. 10, above recited, applies, or was intended to apply, to cases of this character or any other summary proceedings before an officer out of court. In such proceeding the office of attorney or counsel is not recognized. One man has as good a right to appear for a party there, as another, provided he be actually retained; and the fact that the person offering to appear and act for one of the parties, is an attorney or counsellor of a court of record, gives him no authority to appear.

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The statute under which the proceedings in this case were had gives to the complainant his costs and expenses, provided he becomes entitled to restitution of the premises, which are to be assessed by the judge. Such costs and expenses do not in my judgment, include attorney or counsel fees, and the county judge was right in rejecting them in the present case (Partridge agt. Ford and Norton 5 *How. Pr. R.* 21). There are no items charged in the bill in relation to the writ of certiorari.

It would have been improper to have charged any, for the reason that it was a common law certiorari, brought after the trial of the traverse, for the purpose of having the proceedings reversed, and not for the purpose of trying the traverse; and no costs are taxable in such case in favor of one party against the other; and, besides, the certiorari was quashed on motion, without any direction respecting costs.

The motion is denied with seven dollars costs, to be paid by the relator.

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### SUPREME COURT.

NEWBURY agt. NEWBURY.

In motions that are to be heard on the pleadings, it is never necessary to serve copies on any of the parties to the suit. Therefore a motion to vacate an order for an injunction made upon service of a *notice merely*, entitled in the action, stating that the motion would be founded on "a copy of the injunction and papers served therewith on the defendant," *held*, sufficient.

It is not necessary on such a motion to serve an affidavit stating that an action has been commenced; the papers upon which the motion is founded presupposes the fact. (*The decision in Osborn agt. Lobdell*, 2 *Code Rep.* 77, *disapproved.*)

In an action to recover damages for the conversion of property which the defendant was under obligation to divide with the plaintiff, annually each year, *held*, that an injunction which restrained the defendant "from selling, delivering, or in any manner disposing of, or appropriating to his own use any of the produce of the farm, until a division was made," was improperly granted, especially as it seemed the principle ground relied upon was that the plaintiff was afraid that the defendant would not keep an accurate account of the articles. Besides it was not alleged that the defendant was irresponsible.

*Motion to vacate an order made by a County Judge for an injunction.* HIRAM DENIO, read a notice of the motion, which was

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entitled in the suit, stating that the application would be founded on the copy of the injunction and the papers served on the defendant. No affidavit, or other papers except the notice, had been served on the plaintiff. Whereupon

J. BENEDICT, for the plaintiff, made a preliminary objection that it did not appear that a suit had been commenced, citing *Osborn vs. Lobdell* (2 *Code Rep.* 77). The justice reserved the question, and the motion was argued on the merits.

GRIDLEY, Justice.—This motion is made under the 225th section of the Code, which declares that *at any time*, before trial, the defendant may apply, upon notice, to a judge of the court to vacate or modify an injunction. The application may be made on the complaint and affidavits, on which the injunction was granted; or, upon affidavits on the part of the defendant, with or without an answer. A preliminary objection is made to bringing on the motion by the counsel for the plaintiff, on the ground that it does not appear *that a suit is commenced*. The notice was entitled in the action, and stated that the motion would be founded on “*a copy of the injunction and papers served therewith on the defendant.*” The motion may be made “*at any time,*” before the trial, and I see no greater reason for making an affidavit, and serving a copy of it, stating that a suit is pending in this case, than in any other motion which is made on the pleadings. The case of *Osborn vs. Lobdell* (2 *Code Rep.* 77), is cited as authority. It is, indeed, desirable that there should be a uniformity in the practice, but in that case the justice held that it did not appear that a suit had been commenced, notwithstanding the motion was made on copies of affidavits, and *all the pleadings in the cause*. It seems to me that it can not be necessary to serve an affidavit stating that a suit is commenced, when the notice and the papers on which the motion is made, presuppose the fact, and when the plaintiff can show the fact, if, in truth, no suit has been commenced. In motions that are to be heard on the pleadings, it is never necessary to serve copies on any of the parties to the suit; but it is only where a motion is made against a person who is not a party to the suit, that it is necessary to



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serve copies of the pleadings and other proceedings (*Morry vs. Green*, vol. 4th p. 59, of cases reported in the supplement to the *Saratoga Sentinel*). When a party moves for costs in a case where a special motion is not brought on, pursuant to notice, the counsel who asks for costs merely reads the notice he has received. He is never required to produce an affidavit of the attorney, that the notice was served on him. I am therefore of opinion, that the notice and proof of service was enough in the first instance, to entitle the defendant to read the papers that had been served on him in the suit. If there be any error in the papers, the opposite party may show it in opposition to the motion.

Upon the merits of the motion, it appears by the complaint, that the plaintiff is the widow and devisee of Samuel Newbury, deceased; that before the death of the said Samuel, he executed an agreement to and with the defendant, by which he conveyed to him the one half of his farms, and the defendant agreed to work the farms in a good and workmanlike manner, and to render half of the produce thereof to the said Samuel, during the lives of the said Samuel and his wife (the plaintiff in this action). That after the death of the said Samuel, the plaintiff brought an action against the defendant and obtained a decretal order by which it was determined that the plaintiff was entitled to receive, and the defendant was to pay annually to the plaintiff the one half of the produce of the farms, except what should be necessary to keep the team and stock mentioned in the said agreement, during her life; and by which it was referred to Volney Owen, Esq., to state an account between the parties; that she has caused a demand to be made of her portion of the produce, which the defendant has refused to deliver, pursuant to such demand; praying an injunction and damages for the produce converted to the use of the defendant.

Upon this complaint and the accompanying affidavits, the county judge granted an injunction enjoining the defendant "*from selling, delivering, or in any manner disposing of or appropriating to his own use, any of the produce of the farms except what is necessary to keep the stock and teams on the farms until a division of the produce is made.*"

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Jewett and wife agt. Jewett.

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This is a suit to *recover damages* for the conversion of property, which the defendant was under obligation to divide with the plaintiff "*annually*" each year. Therefore, the injunction is not provided for by the 219th section of the Code. There is no allegation in the complaint or affidavit, that the defendant is not abundantly responsible for any judgment the plaintiff can obtain against him. Why, then, should he be enjoined from taking and using for his family, the ordinary productions of the garden and farms? or why should he be prohibited from selling such articles as require to be sold during the current year, and before the division? The answer is that she is afraid he will not keep an accurate account of such articles. But there is no reason shown why she entertains this belief. There is no necessity for an injunction. When the time comes for a division, if the defendant has not the property to divide, he may be prosecuted and made to account; and the plaintiff has the same remedy as every individual has, who lets a farm to a tenant on shares, and who sues the tenant for a breach of the agreement in not delivering to him his half. The injunction must be vacated with \$10 costs.

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## SUPREME COURT.

JEWETT AND WIFE agt. JEWETT.

In an action commenced before a justice of the peace where the answer of the defendant interposes a plea of title, by which the justice is ousted of jurisdiction, and an action for the same cause is commenced in this court, the action must be governed by the rules of pleading and practice by which other actions are conducted in this court, except where the statute has provided otherwise.

And the only statutory regulation restricting the parties in their pleadings is that contained in § 60 of the Code, which requires the plaintiff to complain for the same cause of action only, on which he relied before the justice and that the answer of the defendant be the same he made before the justice.

Therefore where the answer contains allegations of new matter a *reply* is necessary in this court, as in other actions. And so too, if it is proper that the notice authorized by § 64, be given in the answer, because this notice is contained in and made part of the answer. (*The decision in McNamara agt. Bitely*, 4 How. 44, holding that a reply is necessarily dispensed with in such cases, overruled.)

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Jewett and wife agt. Jewett.

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*General Term, Nov. 1850*—GRIDLEY, ALLEN and HUBBARD, *Justices*. This is an action for breaking and entering the close of the plaintiffs and tearing away and demolishing a mill dam there erected, and obstructing a water course or ditch, &c.

The defendant denied the allegations of the complaint, and by his answer alleged that at the time when, &c. he was seized in fee simple of a certain piece of land described by metes and bounds, &c., and stating facts to justify the entry under his title to remove obstructions, &c.

To this answer there was no reply. The plaintiffs had commenced an action before a justice of the peace for the same injury, and the defendant had in that court set up title and gave the undertaking required by law and the action was discontinued and this action brought. The cause came on to be tried at the circuit court in Jefferson county in April 1850, and at the close of the evidence for the plaintiffs the defendant asked the court to nonsuit the plaintiffs or direct a verdict for the defendant on the ground that there being no reply to the answer the defence was admitted, and that such defence was a justification and entitled the defendant to a verdict. The court refused to comply with the request and decided that no reply was necessary in a suit originating in a justice's court, and that defendant was bound to prove the new matter set up in his answer; to which decision the defendant excepted, and after evidence was given for the defendant a verdict was rendered against him, upon which judgment was perfected, from which the defendant has appealed.

J. MULLEN, *for Defendant*.

J. CLARKE, *for Plaintiffs*.

By the court, ALLEN, Justice.—Although several other questions are presented by the record in this action, the only one which I propose to consider is that arising upon the ruling of the court that no reply was necessary to an action commenced as this was, in a justice's court, and discontinued upon the putting in of an answer by the defendant showing that title to real property would come in question, and complying with the requirements of the Code.

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Jewett and wife agt. Jewett.

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Under the practice prior to the Code, there appears to be no doubt that in a case like this, where the defendant had interposed his defence of title in himself, or third persons, by plea before a justice, the plaintiff would necessarily reply to such plea upon its being interposed in the action which might be brought in a court of record (per NELSON, J., *Tuthill vs. Clark*, 11 *Wend. R.* 645; *Dorman vs. Lang*; 3 *How. Pr. R.* 59; *Mc Namara vs. Bitely*, 4 *id.* 44, per WILLARD, J). The same practice was held to be regular and necessary under the Code of 1848 (*Royce vs. Brown*, 3 *How. Pr. R.* 391). The provisions of the two Codes for the discontinuance of an action pending before a justice of the peace upon the interposition of an answer showing that the title to real property will come in question, and for the commencement of an action for the same cause in this court and regulating the pleadings and proceedings in this court are the same, and couched in the same language (*Code of 1848*, § 48-54; *Code of 1849*, § 55-61). Both are substantially a reenactment of the provisions of the Revised Statutes upon the same subject, with a mere change of language to make it conformable to the new system (2 *R. S.* 236, § 59-65).

The complaint in this court must be for the same cause of action on which the plaintiffs relied before the justice and the answer of the defendant the same. The provision of the Revised Statutes was the same, substituting declaration and plea, or plea and notice, for complaint and answer. Under both systems the pleadings in the court of record were required to be substantially, if not literally, the same as in the justice's court, so far as they had progressed in that court. In no event can a reply be put in before the justice, and could not have been irrespective of the provisions of the Code of 1849, dispensing with that pleading in all cases in that court. The answer setting up title with a compliance by the defendant with the requirements of the statute, ousts the justice of jurisdiction, and the issue if incomplete can not be completed in that court. The suit before the justice is discontinued; that action is ended. The action in the Supreme Court is a new action for the same cause, and is not a continu



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ation of the action before the Justice (People vs. Judges of Yates Co. 3 *How. Pr. R.* 174; Hyland vs. Loomis, *id.* 223; *Code*, § 57). Upon the *discontinuance* of the action the plaintiff may prosecute an action for the same cause, not the same action, in the Supreme Court (§ 60). The suit in the Supreme Court is commenced by summons and complaint as other actions in that court are commenced (§ 56). The legislature have not provided for a transfer of the action from the justice's court to the Supreme Court and a continuance of the same action in the latter court as has been done in Massachusetts (10 *Pick.* 504). The action in the Supreme Court must necessarily be governed by the rules of pleading and practice by which other actions brought in that court are conducted, except where the statute has provided otherwise. The declaration of the plaintiff under the Revised Statutes and the complaint under the Code, might be verbal before the justice, but in the County Court under the former system, and in this court under the present, they are necessarily in writing. Each court being governed in this respect, as well as in other respects, by its peculiar practice and forms of pleading and procedure. The only statutory regulation restricting the parties in their pleadings is that contained in § 60 of the Code, which requires the plaintiff to complain for the same cause of action only on which he relied before the justice, and that the answer of the defendant be the same which he made before the justice. With the exception created by this provision the pleadings are to be according to the practice of this court. The Code nowhere provides that the trial in the Supreme Court shall be upon the same pleadings which were interposed before the justice, and no other, as in the case of an appeal or removal of a cause before trial. The sufficiency and form of the pleadings must be tested and governed by the same rules by which those in other actions in this court are tested and governed. It is said that the change in the law regulating the pleadings in justices courts, by limiting the pleadings in that court to a complaint and answer, had necessarily dispensed with a reply; and a distinguished judge in another district, whose opinions are entitled to great respect, so held in *McNamara vs. Bitely*, *supra*.

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I am constrained to believe that the change in the law in the respect mentioned, has not affected and was not designed to affect the proceedings subsequent to the answer in this court.

1. The provision of section 55, in relation to the answer before the justice showing that title will come in question, is the same that it was in the Code of 1848, when pleadings in justice's court were the same as in this court, and there is no change in the phraseology to show the intent of the legislature to vary the form of the answer in this case. 2. Pleadings in justices' courts in ordinary cases, answers as well as complaints, may be oral or in writing, at the option of the parties (*Code*, § 64); but in this case the answer must be in writing, countersigned by the justice (§ 55). 3. The reasons for dispensing with the formal pleadings in a court of a justice of the peace, and which led to a change of the provisions of the Code upon that subject, do not apply to this case. There is certainly no reason why the pleadings in this action in this court should not be the same as in other actions, and unless the words of the statute call for such construction we should not hold the law to be so changed as to authorize different forms of pleading in the same court, in different actions, without some apparent reason. I think the answer required by section 55, is in form the answer required by the Code of 1848, in all courts, and by the Code of 1849 in this court, and not the general issue and notice of special matter authorized by sub. 4 of § 64 of the latter Code. There was great propriety in allowing this general pleading in causes in which the issue was to be joined and tried in a justice's court; but I am unable to discover any reason for the application of the same rule to actions to be tried in this court; and as I do not think the words of the statute call for such application, I must hold that it is inapplicable. But lastly, if under section 55 the defendant may put in an answer and notice, or answer containing a notice, as authorized by § 64, I am still of the opinion that in this court a reply to any new matter contained in the answer is necessary. A reply is dispensed with in a justice's court for obvious reasons, if the cause progresses to a trial in that court; but the pleadings in this court

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are regulated by the Code, title 6, part 2; and if an answer is in the form of a notice before the justice and must necessarily be in the same form in this court, still any allegation of new matter not controverted, must be taken as true. No particular form of an answer is required by the Code in any action brought in this court, and an allegation is equally an allegation whether in the form of a notice that such is the fact, or a positive affirmation of its existence, and the whole whether notice or positive allegation is a part of the answer. The Code says that every allegation of new matter in the answer not specifically controverted by the reply as prescribed in § 153, shall, for the purposes of the action, be taken as true. The notice authorized by § 64 is not annexed to the answer but is contained in it. In other words it is a somewhat less formal allegation of the same facts, and no demurrer is allowed or reply required to it in a justice's court. It is not like a notice annexed to a plea under the former practice, which was allowed in all courts, and to which no replication was necessary in any court. It was not, in fact, a pleading in the cause, and it does not follow because no replication was necessary or could be put in to a notice in a case like this under the old system, that no reply is necessary to a notice of facts set up in an answer under the present system. There was then no provision like that in § 168 of the Code, which applied to the allegations in the notice. The justice erred in holding that the defendant was bound to prove the allegations of new matter in his answer to which there was no reply, and for that reason judgment must be reversed and a new trial granted; costs to abide event.

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Andrews agt. Durant.

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## SUPREME COURT.

ANDREWS AND OTHERS agt. DURANT AND OTHERS.

In all cases of appeal from the Circuit Court, the judgment on the appeal should be certified to the clerk with whom the roll is filed, to be there entered and docketed.

Where the defendants entered judgment of nonsuit and filed the roll in Ulster county, where the venue was laid and on appeal to the general term at Albany, judgment was affirmed, and the defendants entered judgment and filed another roll in Albany county, *held*, that the latter judgment was irregular.

*Ulster Special Term, November 1851.* The venue in this cause was laid in the county of Ulster. The cause was tried there in April 1850, and a nonsuit entered on which the judgment roll was filed in the clerk's office of Ulster county, and judgment perfected for \$93·79. The plaintiffs appealed, and the appeal was argued before the general term at Albany, and judgment was affirmed at May Term, 1851. The defendants thereupon made up a judgment roll and filed it in the clerk's office of Albany county, where judgment was perfected for \$71·56, the costs of the appeal, on the 9th of June 1851. A transcript was sent to Ulster on which the judgment was docketed, and an execution issued to the sheriff of Ulster county. The execution described the judgment as rendered for \$165·35, which was the amount of both judgments. The plaintiffs now move to set aside the judgment roll and all subsequent proceedings for irregularity, on the ground that the judgment roll filed in the county of Albany ought to have been filed in the county of Ulster, and that there was no such judgment as that described in the execution.

R. F. MACAULY, *for Plaintiffs.*S. H. HAMMOND, *for Defendants.*

PARKER, Justice.—The most important question to be decided is whether the judgment roll was properly filed in the county of Albany. The Code provides (§ 311) that “the clerk shall insert in the entry of judgment on the application of the prevailing party, upon two days notice to the other, the sum of the charges



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for costs as above provided, and the necessary disbursements and fees of officers allowed by law, including the compensation of the referees, and the expense of printing the papers upon any appeal."

What clerk is here intended? the clerk of Ulster, where the cause was first tried, or the clerk of Albany, where the judgment was affirmed on appeal? This question seems to be fully answered by the 466th section of the Code, which says: "The word 'clerk,' as used in this act, signifies the clerk of the court where the action is pending, *and in the Supreme Court, the clerk in the county mentioned in the complaint*, or in another county to which the court may have changed the place of trial, unless otherwise specified."

It was then the clerk of Ulster, and not the clerk of Albany, who had the power to adjust the costs, and file the roll and perfect judgment.

It was clearly the policy of the Code that all the papers in the cause should be filed in one clerk's office, so that they might readily show the history of the cause, and be attached together to constitute the judgment roll, as directed in section 281. And in accordance with that view, Rule 4, adopted in 1849, requires that all papers shall be filed in the office of the clerk of the county specified in the complaint as the place of trial. The filing of the judgment roll at Albany was a violation of this rule.

There is a still more explicit provision of the Code in regard to entering judgment on appeal; but it is found in the chapter regulating appeals to the Supreme Court from an inferior court, and is therefore probably applicable only to appeals from a judgment rendered by a County Court. It is as follows: "Judgments upon appeal shall be entered and docketed with the clerk in whose office the judgment roll is filed. When the appeal is heard in a county other than that where the judgment roll is filed, or is not from a judgment of a County Court, the judgment upon the appeal shall be certified to the clerk with whom the roll is filed to be there entered and docketed."

There are certainly strong reasons for supposing that this sec-

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tion was intended to apply to appeals from the circuit; because nothing is said in the next chapter which treats of appeals in the Supreme Court from a single judge to the general term, about the place of entering judgment, and there was no more reason for excepting a judgment in the county court, than there was for excepting judgments in a mayor's or recorder's court, which are expressly enumerated in section 344.

But conceding that this special provision in section 347 is not in terms applicable, yet it contains the precise practice that ought to have been followed in this case under the other sections I have referred to, and rule 4. In all cases of appeal from the circuit court, the judgment on the appeal should be certified to the clerk with whom the roll is filed, to be there entered and docketed. The papers are thus all kept in the office of the clerk of the county specified in the complaint as the place of trial.

It is said that too much time has elapsed since the filing of the judgment roll to allow of the interference of the court to correct the irregularity. But I think the affidavits show a sufficient excuse for the delay. It appears that the attorney for the plaintiffs did not discover the irregularity till he had made out his papers to appeal to the Court of Appeals, and then, learning that the roll was not on file at Ulster, he immediately entered into a correspondence with the attorneys for defendants on the subject, informing them in his letter, of the irregularity, and that he did not know where to file the undertaking, or on what clerk to serve his notice of appeal. It was certainly not a mere technicality of which the plaintiffs' attorney complained; but the irregularity was of such a character as to create some embarrassment to the plaintiffs in making their appeal; and it ought to have been corrected on the application of the plaintiffs' attorney.

The defendants' counsel asked, on the argument of this motion, that, in case he was irregular, the court would direct the roll to be filed in Ulster, *nunc pro tunc*, as of 9th June 1851. But I know of no authority for such a course in a case like this. If it may be done in this case, it may be done in every case of irregular practice. The motion must be granted with \$10 costs.

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Heller agt. Heller.

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## SUPREME COURT.

HELLER agt. HELLER.

Service of a summons upon one with whom a person of unsound mind resides, is not good service. It should be upon the defendant himself, and if he has a committee, also upon the committee.

If a lunatic defendant has a committee whose interests are not adverse to him, the committee can be appointed *guardian ad litem*, *ex parte* and of course. In England, no guardian in such case, perhaps, is now necessary.

Where there is no committee of a person of unsound mind who is sued, a *guardian ad litem* can be appointed on the application of the plaintiff, or on the application of some relative, &c. If the application is by a relative, notice of the application should be given, unless the bill or complaint states that the defendant is a lunatic.

By the Code of 1851, a married woman, when her husband is not her coplaintiff or codefendant, must prosecute or defend by her next friend.

A married woman said to be of unsound mind had lived with her brother, apart from her husband many years. On a suit for a divorce *a vinculo*, it was held that notice should be given of a motion made on the petition of her brother for the appointment of a guardian or next friend; it not appearing that the complaint contained any allegation that she was a lunatic.

— *Special Term, November 1851.* Action against wife for a divorce for adultery.

The petition of the defendant's father and brother, duly verified, stated that the defendant resided with her brother, apart from her husband, and had done so for many years, and the summons and complaint were served on him. That she had no committee, and her father and brother were her only male relatives in the state, and that she was insane and totally incapable of putting in an answer or conducting the defence, or transacting any business whatever.

S. AMES, for defendant, moved *ex parte*, for the appointment of a *guardian ad litem*, or next friend, to appear and defend the suit.

HAND, Justice.—If the summons was served on the brother of the defendant only, the service is not sufficient, and I think the court should not act upon such service, unless the irregularity is in some way waived. If she be insane, the service must be personal; and if there be a committee, also on the committee (*Code*,

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Heller agt. Heller.

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§ 134). The section (409) relative to service at the residence, does not apply to the service of a summons.

Before the Code, the committee of a lunatic defendant, not having interests adverse to the lunatic, could have an order appointing the committee guardian of course. And no notice to the opposite party was necessary when the committee applied (New v. New, 6 *Paige*, 237; 1 *Barb. Ch. Pr.* 86; *Shelf. on Lun.* 424). Indeed, in such cases in England, no guardian, it would seem is now necessary (*Lady Hartland v. Atcherly*, 7 *Beavan*, 53; 2 *Dan. Pr.* 870). By the Code, "when a married woman is a party, her husband must be joined with her, except that when the action concerns her separate property, she may sue alone; and when the action is between herself and her husband, she may sue or be sued alone. But where her husband can not be joined with her as therein provided, she shall prosecute or defend by her next friend" (§ 114).

Where he is not a complaintiff or a codefendant, it seems, she must now always, prosecute or defend by *prochien ami*. The alteration of § 114 by the amended Code of 1851, seems to have settled the practice which was mooted in *Shore v. Shore*, 2 *Sandf.* 715; *Tippel v. Tippel*, 4 *How. Pr. R.* 346; and *Coit agt. Coit*, 6 *id.* 53; *same case*, 4 *id.* 232.

Where no committee had been appointed, a person of unsound mind, before the Code, defended by a guardian *ad litem* (*Shelf. on Lun.* 425; *Wilson v. Grace*, 14 *Ves.* 172; *Mitf.* 104; *Stor. Eq. Pl.* § 70; 1 *Dan. Pr.* 203; 1 *Barb. Pr.* 86). But whether notice of the application should be given to the opposite party, in such cases does not seem to be well settled. No notice is taken of the appearance of counsel for the plaintiff in the reports of the cases of *Wilson vs. Grace*, *supra*; *Markle vs. Markle* (4 *J. C. R.* 168); *Att'y Gen. vs. Waddington* (1 *Mad. R.* 321); nor in *Howlett vs. Wilbraham* (5 *id.* 423). It is said in this last case, that the plaintiff moved; but it appears by *Daniel's Practice* that the motion was on the part of the defendant (1 *Dan. Pr.* 203). But it does not appear that notice was not given in the above cases; and in *Pryce vs. Page*, there was an appearance for the



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Thumb agt. Walrath.

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plaintiff (1 *Mad. R.* 321). Where the complaint does not state that the defendant is a lunatic, I am inclined to think, notice of the application to appoint a guardian should be given, particularly in a matter so important to the parties as a suit for a divorce *a vinculo*. The plaintiff should have an opportunity to know why the suit is defended by a guardian instead of the party. In this case, the defendant being a *feme covert*, must, as we have seen, appear by a next friend. The next friend for a *feme covert* plaintiff, in ordinary cases, acts by her consent (*Fulton v. Rosevelt*, 1 *Paige*, 180). But a lunatic can not consent. However, a plaintiff may apply for the appointment of a guardian *ad litem* for a lunatic defendant (*Shelf. on Lun.* 426); and a relative did so, in *Markle vs. Markle*, *supra*. The next friend, required by the Code, stands in the place of the former guardian *ad litem*, and should be appointed in the same way.

But notice of the motion should have been given, unless the complaint alleges that the defendant is insane, in which case, that should be made to appear before the motion can be granted *ex parte*. Order refused.

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## SUPREME COURT.

THUMB agt. WALRATH.

An answer, commencing as an answer to the whole complaint, and assuming to answer the whole, but containing facts which only constitute a defence to a part of the complaint, is bad, on demurrer.

*Montgomery Special Term, June 1851.* The complaint is ejectment for a piece of land, described by metes and bounds, containing thirty-two acres; being the same lot purchased by the plaintiff of Adam I. Walrath.

The second defence set up in the answer is to the whole complaint, that at the time the plaintiff purchased of Adam I. Walrath the defendant was in possession of three and a half acres of the premises, being parcel of the premises mentioned in the complaint,

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Thumb agt. Walrath.

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as tenant at will under said A. I. W., and that before he, the plaintiff, so purchased, the defendant had sowed the said three and a half acres with wheat and rye, and that said grain was not, at the commencement of this suit, fit to harvest, but still remained growing. That the plaintiff, when he purchased, well knew said fact.

The plaintiff demurs to the second defence, assigning for cause, that it does not state facts enough to constitute a defence; and, amongst other things, that the defendant does not state that he has received notice to quit, &c.

H. BAKER *for the Defendant.*

J. A. SPENCER, *for the Plaintiff.*

WILLARD, Justice—The second defence in this action, or as we should call it in former times, the second *plea*, commences as an answer to the whole complaint, and assumes to answer the whole, by showing that the defendant was rightfully in the possession of three and a half acres, parcel of the thirty-two acres of land, to recover which the action was brought. This is no answer to the whole action, and consequently upon well settled rules of pleading, the answer demurred to is bad (1 *Chitty Pl.* 510; 1 *Saund.* 28, n. 3; Cooper vs. Embry, 1 *Wen.* 347; Root vs. Woodruff, 6 *Hill*, 421). It does not help the matter that the defendant has put in a complete answer to the whole complaint in his first defence. The two answers must each stand by itself, and one can not aid the other. The defendant should have interposed an appropriate answer as to all but the three and a half acres; and, as to that part of the premises, set out his defence. If it be granted that a tenant at will, who has put in a crop, is entitled to retain possession until the time of harvesting the crop has arrived, it by no means follows that he is entitled to retain the possession of the whole farm. It is enough that he has the necessary egress and regress to protect the crop while growing, and to take it off when it has come to maturity (see 4 *Kent Com.* III). The demurrer is well taken to the second defence, but the defendant is entitled to amend on payment of \$22 costs.

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Ball agt. Syracuse and Utica Rail Road Co.

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## SUPREME COURT.

BALL agt. THE SYRACUSE AND UTICA RAIL ROAD COMPANY.

A justice of this court, at special term, has power to hear and decide a motion for a new trial, on the ground that the verdict is against evidence (*Lusk agt. Lusk*, 4 *How.* 418; *Haight agt. Prince, Sandf. S. C. R.* 720). But the case must be reserved under § 264, or the proceedings be stayed under § 265. If the judgment is suffered to become final under the latter section, the motion can not be entertained.

*Madison Special Term, October 1851.* This cause comes up on a case made to set aside the verdict of the jury. The cause was tried in December last at the Madison circuit, and resulted in a verdict for the plaintiff, upon which a judgment was entered. There was no order granted under § 264 of the Code, reserving the case for argument or further consideration and there was no stay under § 265.

BARLOW & SNOW, *for Plaintiff.*S. T. FAIRCHILD, *for Defendant.*

MASON, Justice.—I have no doubt but Justice GRIDLEY was right in the case of *Lusk agt. Lusk and others* (4 *How. Pr. R.* 418), in holding that a justice of this court, at special term, had power to hear and decide a motion for a new trial on the ground that the verdict is against evidence; and such was the decision of the Superior Court of the city of New York in the case of *Drag vs. Lakey & Pine*, (2 *Sanf. S. C. R.* 681,) reaffirmed in *Haight vs. Prince* (2 *id.* 720).

There is no doubt in my mind, however, that to authorize a justice of this court to set aside the verdict of a jury at special term as against evidence, the case must be reserved under the 264th section of the Code, or else the proceedings must be staid under section 265. Otherwise the judgment by the latter section becomes final after four days. I do not think that after the judgment has been entered and becomes final, as it does after the four days, that the judgment can be reviewed in any other way than that prescribed by title 11 of the Code, and which is by appeal

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Tomlinson agt. Van Vechten and others.

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to the general term; and such is the decision in the case of *Drag vs. Lakey & Pine* (2 *Sanf. S. C. R.* 681). The judgment in this case having become final, I must deny the motion for a new trial and leave the defendant to pursue such remedy as he may have, either by appeal from this order to the general term or by appeal from the judgment—the latter of which seems to be a doubtful remedy if the decision of this court in the case of *Collins agt. The Albany and Schenectady Rail Road Company* (5 *How. Pr. R.* 435), is to be followed. Motion denied with costs.

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SUPREME COURT.

TOMLINSON agt. VAN VECHTEN AND OTHERS.

A defendant has twenty days to appear and answer, after the expiration of the time prescribed by the order for publication of the summons.

The same rule applies in cases of publication, where service has been personally made out of the state.

*Erie Special Term, August 1851.* Application for judgment upon the failure of the defendants to answer.

The service was made by the publication of the summons pursuant to an order made by a judge, as provided in section 135 of the Code. Twenty days had not elapsed, after the time prescribed in the order for the publication of the summons, when this application for judgment was made.

MR. CUTTING, *for Plaintiff.*

MARVIN, Justice.—The application is premature. The defendants have twenty days within which to appear and answer, after the expiration of the time prescribed by the order for publication. The service of the summons is not complete, until the expiration of that time (*Code* § 137).

I have also held, in cases where the publication of the summons had been ordered, and service of a copy of the summons and complaint had been personally made, out of the state, that the defendant had twenty days to appear and answer, after the



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George Survivor &c. agt. McAvoy.

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expiration of the time *prescribed in the order* for the publication. That such personal service, out of the state, was only *equivalent* to the publication of the summons and the deposit of a copy of the summons and complaint in the post office (§ 135).

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SUPREME COURT.

GEORGE SURVIVOR &amp;c. agt. McAVOY.

A *verification* is no part of a complaint. Therefore, a new complaint served, after answer, which was in all respects like the original, except that it was verified, *held*, to be no *amended* complaint—defendant might disregard it.

*Onondaga Special Term, December 1851.* The action in this case was commenced by service of summons and complaint not verified. The defendant put in his answer without oath. The plaintiff then served what purported to be an amended complaint, in precisely the words of the original complaint, with the addition of a verification. The defendant refused to receive it, and the plaintiff in due time took judgment against him for want of an answer. A motion is now made to set aside the judgment for irregularity.

GRAVES & WOOD, *for Plaintiff.*LOOMIS & JONES, *for Defendant.*

PRATT, Justice.—The motion must be granted. The verification is no part of a complaint under the Code. In serving a new complaint with a verification attached, is no amendment of that pleading. The defendant's attorney, therefore, was not bound to receive it. At all events, as the allegations were not changed, it required no new answer.

Perhaps it might be well enough for the legislature to provide some way to enable the plaintiff, when he has reason to suspect the good faith of the defendant in putting in his answer, to require him to verify it, but I find no such provision now in the Code. As it now stands, if the plaintiff when he commences the suit chooses not to verify his complaint, he must take the risk of an answer, and if it be palpably untrue he can perhaps move to strike it out, or he may undoubtedly discontinue and commence a new suit. Motion granted with \$10 costs.

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Baker agt. Hoag.

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## SUPREME COURT.

BAKER agt. HOAG.

MACY AND GAUL agt. J. STOTT AND C. H. STOTT.

Applications for the set off of judgments are addressed to the discretion of the court. And where the court discover that equity will be promoted and injustice prevented by the set off of one judgment against another, it will be done, though the parties to the judgments are different.

Where Baker sued Hoag in replevin for a quantity of wool, and Macy & Gaul were sureties for Baker on the replevin bond, and took the wool, after it was replevied, to indemnify them, and then let J. & C. H. Stott take the wool to dry, afterwards to be returned to them; and while the Stotts had possession of it, they purchased it of Hoag, the defendant in the replevin suit—Macy & Gaul then brought an action of trover and recovered judgment against the Stotts for the amount of the wool, which judgment was assigned to Baker, the plaintiff in the replevin suit; and Hoag subsequently recovered judgment against Baker in that suit, for the amount of the wool, *held*, that one judgment should be set off against the other.

*Albany Special Term, March 1851. Motion to set off Judgments.* The first action was replevin, and was brought in February, 1847, to recover a quantity of wool which was owned by the defendant, and which having been sunk in a canal boat, in the Hudson river, had been rescued by the plaintiff. He claimed that he was entitled to hold the wool until he was compensated for his services. The plaintiffs in the second action had executed the replevin bond as sureties for the plaintiff in the first action. The wool, being delivered upon the replevin, was deposited with Macy & Gaul for their indemnity, as sureties upon the replevin bond. They delivered the wool to the defendants in the second action, who were manufacturers, to be dried and then returned to them. While the wool was in the possession of the Stotts, they purchased it of Hoag, the real owner, and paid him for it, upon his indemnifying them against any claim of Macy and Gaul, or Baker. Macy & Gaul brought an action of trover against the Stotts for the wool. In that action the plaintiffs, on the 10th day of July 1850, recovered a judgment for \$1480.38, damages and costs. The costs included in the judgment, amount-

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Baker agt. Hoag.

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ing to \$273·68, have been paid to the plaintiff's attorney. After the verdict was rendered in favor of the plaintiffs in the second action, they assigned it to Baker, who is now the owner of the judgment.

The defendant in the first action, having obtained a verdict in his favor for \$1175·58, a judgment was perfected upon that verdict on the 11th of March 1851, against Baker, for \$1476·07, including costs. On the same day the defendants in each suit served notice of this application. On the 24th of March, and before this motion was made, the plaintiff in the first action, appealed from the judgment rendered therein, to the Court of Appeals. The motion is, that one judgment may be set off against the other, or, an appeal having been brought in the first action, that proceedings for the collection of the judgment in the second action be stayed until the determination of the appeal.

H. HOGEBOOM, *for Plaintiffs.*

K. MILLER, *for Defendants.*

HARRIS, Justice.—The power of this and of every other court to direct one judgment to be set off against another, depends not upon any certain rule of law, but upon the equitable control which every court may exercise over its own suitors and process (*Dunkin vs. Vandemburgh*, 1 *Paige*, 622; *The People vs. New York Com. Pleas.* 13 *Wend.* 649). Such applications, therefore, are addressed to the discretion of the court, which discretion is to be exercised in such a manner as to do equity and prevent injustice. Its exercise is never demandable as a right, and the manner of its exercise, is not the subject of review upon error (*Barbour on Set-off*, 33; *Smith vs. Loudon*, 1 *Sandf. S. C. R.* 696). The criterion by which every such application is to be determined is, whether it is equitable. If it is, if justice will be promoted by it, if no other rights will be infringed by it, then the set-off will be ordered, and that, too, though the parties to the different judgments are not the same (*Montagu on Set-off*, 6; *O'Conner vs. Murphy*, 1 *H. Bl.* 659). In the latter case, Murphy, claiming to be the owner of a vessel, had brought an action of

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Baker agt. Hoag.

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trover against one O'Loughlin, who was the master of the vessel. The action was defended by O'Conner and O'Sullivan, who were the real owners of the vessel. Judgment was recovered against Murphy for the costs of the suit; O'Conner had also sued Murphy upon a note. Having failed in this action, Murphy had recovered judgment against him for the costs of this suit. Upon a motion to set off one of these judgments against the other, it was objected that a judgment of Murphy against O'Conner could not be set off against a judgment of O'Loughlin against Murphy, but Lord Loughborough said that O'Conner was *equitably* entitled to the costs in the action against O'Loughlin, and he ought therefore to be permitted to set them off against the judgment in the other action. The principle of this case has been repeatedly recognized, and will be found stated in every book which speaks of the subject. In every case, the court having control over the parties and its own proceedings, will do what in view of all the circumstances of the case, it deems to be equitable.

The application of this rule to the case in hand would not be difficult. Assuming, as we must, that the judgments are right, it appears that the wool, which was the subject of litigation in both suits, was the property of Hoag, and that it was wrongfully claimed by Baker. Macy and Gaul have never claimed to have any interest in it beyond their own indemnity, as sureties upon the replevin bond; and even that interest is now vested in Baker by assignment. But let it be supposed that they had not assigned to Baker. It having been determined that Hoag, and not Baker, was the owner of the wool, they would have held their judgment against the Stotts to secure them against their liability to Hoag upon the replevin bond. And even if the money had been collected upon the judgment, Macy & Gaul would have had no just right to retain it; Hoag might have insisted upon having it applied for the purpose for which they held it, which was the satisfaction of his recovery against Baker. Nor can it be pretended that Baker by his assignment has acquired any better right to collect and retain the amount of the Stott judgment than Macy and Gaul had. In any aspect in which the case can be



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Ford agt. Monroe.

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viewed, it would be inequitable in the extreme, to require the payment of this judgment at the present time; the only legitimate use to which the money, if collected, could be applied, is the satisfaction of Hoag's judgment against Baker. Hoag is himself, both legally and equitably, bound to pay this judgment. Why then compel him to pay it, for the mere purpose of enabling Baker to hold it, to be repaid to him, when the appeal shall be disposed of. If the judgment should be reversed upon the appeal, then, indeed, different questions will present themselves; but upon this motion it must be assumed that the judgment is right, and will not be reversed.

Under these circumstances, I think it proper to direct the set-off, but the order is not to take effect, unless the first judgment shall be affirmed upon the appeal. All proceedings for the collection of the second judgment are to be stayed until the final determination of the appeal, and until the further order of this court. Neither party is to have costs upon this motion.

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### SUPREME COURT.

FORD agt. MONROE.

The sum paid to a witness, on serving a subpoena, for one day's attendance and for mileage, can not be recovered back by the party paying it, unless the witness has failed, without a reasonable excuse, to attend the court in obedience to the subpoena.

If the cause be settled by the parties, after the service of the subpoena, or be put off by the court or the parties, the witness is not bound to refund, though he is then excused from attending.

*It seems*, the witnesses fees are intended, as well to compensate them for their trouble and expense in arranging their affairs preparatory to attending court, as for their actual expenses and loss of time in attending.

*Essex Special Term, July 1851.*

C. B. WRIGHT, *for Plaintiff.*

JAMES & BROWN, *for Defendant.*

WILLARD, Justice.—After this action was noticed for trial at the St. Lawrence circuit in February last, and a convenient time

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Ford agt. Monroe.

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before the circuit, the defendant's attorney subpoenaed his witnesses, who resided about thirty miles from the court house, and tendered to them their fees for one day's attendance and mileage, which they accepted. Shortly after this, the plaintiff obtained a commission, which threw the cause over the circuit, but the plaintiff was ordered to pay the defendant's costs, for that circuit. The defendant claimed that the sum paid to his witnesses on subpoenaing them should be taxed against the plaintiff although the witnesses did not attend. The non attendance of the witnesses was occasioned by a notice from the plaintiff that an order had been granted staying the proceedings, but the witnesses declined to refund to the defendant the money tendered, alleging that it was not more than equivalent to their trouble in preparing their affairs to obey the subpoena. The clerk refused to tax said fees, and the defendant applied at the special term for an order on the clerk, directing him to tax the same.

The charges at the June circuit, disallowed by the clerk rested upon the same principle. The witnesses in both cases were shown to be material, and their failure to attend was not owing to their fault.

If the witnesses were entitled to hold the money tendered, as against the party, subpoenaing them, it is a fair disbursement against the adverse party, unless the failure of the witnesses to attend was occasioned by the party claiming the allowance. The 311th section of the Code requires the clerk to insert in the record, among other things, the necessary disbursements allowed by law to be stated in detail and verified by affidavit.

By the Revised Statutes (2 R. S. 400, § 42) it is required, on serving a subpoena, to pay or tender to each witness the fees allowed by law to such witness for traveling to and returning from the place where he is required to attend, and the fees allowed for one day's attendance. These fees, by the law of 1840, p. 231, are fifty cents for each day, and if the witness resides more than three miles from the place of attendance, traveling fees at the rate of four cents per mile going and returning. A witness duly subpoenaed is bound to attend according to the com-

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Ford agt. Monroe.

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mand of the subpœna; and for every failure, without a reasonable excuse, it is enacted that he shall be deemed guilty of a contempt of the court out of which the subpœna issued, shall be responsible in the proper action to the aggrieved party for the loss and hindrance sustained by such failure, and for all other damages sustained thereby; and shall forfeit to the aggrieved party the sum of fifty dollars, in addition to such damages (2 R. S. 400, § 43). The sum tendered to a witness on serving the subpœna, is a *disbursement allowed by law*, within the meaning of the Code. It belongs to the witness and can not be recovered back by the party paying it, unless the witness has failed, without a reasonable excuse, to attend the court in obedience to the subpœna. If the cause be settled by the parties, after the service of the subpœna or be put off by the court, or by the parties, the witness is not bound to refund, though he is then excused from attending. By accepting the money, the witness impliedly agrees to perform the duty enjoined upon him by the writ. The settlement of the suit by the parties, or the postponement of it, works a discharge of the witnesses liability, to attend court, but does not impair his right to retain the money tendered to him. That was paid him as well to compensate him for the trouble and expense of making preparation for his journey, as for his actual expense and loss of time in attending court. It can not be recovered from him unless he has been in fault.

In *Booth vs. Smith* (5 *Wend.* 107), the witness did not attend the circuit until after the trial. The court said his fees could not be taxed against the adverse party, for being in fault, he could not recover them from the party by whom he was subpœnaed. The same doctrine was advanced in 3 *Hill*, 457. In that case the witnesses of the plaintiff were prevented by accident from attending the first day; and when the cause was put off on the second day of the circuit on payment of costs, it was held the plaintiff was entitled to the witnesses fees for the first day. Here there was no fault of the witness. If he was in fault and could not recover from the party subpœnaing him, the latter could not against the adverse party. In *Ehle vs. Bingham* (4 *Hill*, 595), it was held

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Ford agt. Monroe.

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that fees paid to witnesses who did not attend court could not be taxed as a part of the costs in the cause. The decision went upon the ground that the witnesses *wrongfully* failed to attend, and were therefore liable to refund to the party by whom they were subpoenaed.

In the present case, there was no fault of the witness or the party. The money was properly tendered to and accepted by the witness when he was subpoenaed, and he did nothing to forfeit his right to retain it.

The 7th section of the act relative to the taxation of costs (2 R. S. 653), enacts that charges in the bill of costs for the *attendance* of witnesses can not be taxed without an affidavit stating the distances they respectively traveled, and the days they actually attended. This applies to cases where the charge is made for actual attendance at court, and not to a case like the present, when it is not pretended that the witnesses appeared at court.

It is insisted that this motion can not be entertained, because the bill of costs has been paid by the plaintiff to the defendant's attorneys. The proof is that on the day before the motion papers were served in this case, the plaintiff's attorney paid the costs as taxed, to the clerk of the defendant's attorneys, who gave a receipt therefor in the name of the attorneys. There is no pretence that such receipt was intended as a bar to any right on the part of the defendant to question the correctness of the taxation. In *Day vs. Beach* (1 *How. Pr. R.* 236), the payment was a settlement of the controversy. In *Harris vs. Scofield*, MS. in this court, decided in July 1851, the costs were voluntarily paid by the party against whom they were taxed, and without objection. I thought he was concluded by that act from a subsequent appeal; but there were other grounds for denying the motion, and that point was not necessarily passed upon by the court. There could be no objection to the defendant's attorney receiving what the plaintiffs admitted was their due. The present motion is based upon the supposition that they were entitled to more. I think they are not precluded from making it, by the payment of the sum taxed to their clerk.



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Minor agt. Terry, Reader and Geere.

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The county clerk of St. Lawrence county should have allowed on taxation the witnesses fees as charged in the bill. The sum, therefore, of \$34.80 is directed to be added to the bill and inserted in the record of judgment.

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## SUPREME COURT.

MINOR agt. TERRY, READER AND GEERE.

Where a complaint states all the facts necessary to lay the foundation for an injunction, and the plaintiff swears to them (by verification) positively, the complaint may be used as an affidavit for the purpose of obtaining an injunction. (*This agrees with the decisions in Roome agt. Webb*, 3 How. Pr. R. 327; *Krom agt. Hogan*, 4 id. 225; and *Schoonmaker agt. The Dutch Church*, 5 id. 265: and is adverse to *Milliken agt. Carys*, 5 id. 272.)

Under the present system, since the forms of action are abolished, every action is one upon the case, that is, founded on the particular facts of the case, set forth in the complaint. And in equity, where an injunction is prayed for, the complaint, in most cases, should set out the facts which constitute the foundation of the right, with particularity and minuteness.

In general, "a conveyance subject to a mortgage" is held to mean, "subject to the payment of such mortgage," unless there be something to indicate a different intention (*see the authorities cited in the case*). Where, in a warranty deed was inserted, not as a part of the granting clause, an independent recital, as follows: "The above described premises are subject to a mortgage to David Barton and Benjamin Sweet," after which followed the usual covenant of warranty against all incumbrances—*held*, that the legal construction was, that the clause amounted only to the statement of a fact, which was not inconsistent with the covenant of warranty; and left the question, whether the premises were conveyed subject to the payment of the mortgage, open to parol proof.

Under the present practice, a motion to dissolve an injunction, may be made and opposed upon affidavits of any number of witnesses; it therefore becomes a matter of judicial discretion, upon balancing the evidence adduced, to dissolve it or not.

*At Chambers, August 1851. Motion to dissolve an injunction.*

The injunction was granted to restrain the defendant Terry, from selling, a piece of land, upon an advertisement for the foreclosure of a mortgage pursuant to the statute. It was allowed on a complaint duly verified, and an affidavit. The complaint stated that

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Minor agt. Terry, Reader and Geere.

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Terry was the assignee of a mortgage originally executed, by the plaintiff and Libbeus Geere to David Barton, for \$531·50, under the following circumstances: On the first of April 1848, the plaintiff and the defendant Geere, purchased jointly of one Benjamin Sweet, two pieces of land, the one called the Dean lot and the other the Barton lot; Sweet holding a contract for the last mentioned lot, executed by the owner, David Barton, on which was due \$381·50, for the purchase money. That they purchased these lots and took deeds, running to them jointly. That to secure the purchase price, they executed two mortgages to Sweet, and one to Barton, and included a piece of twenty-six acres of land belonging to the plaintiff individually, in the mortgage to Barton, to secure in addition to the \$381·50 a sum of \$150, which was advanced by Barton to enable the purchasers to pay off a certain incumbrance on the Dean lot. That in the early part of April 1849, the plaintiff and Geere agreed between themselves to divide the land between them, Geere taking the Barton lot, *subject to the incumbrances on it*, and the plaintiff the Dean lot, subject to the liens upon that. That Geere had sold to one Reader the Barton lot, subject to no more than the 381·50; and the plaintiff had sold his twenty-six acres and warranted the title; and that the defendant Terry had advertised the whole premises for sale, and threatened to sell the twenty-six acres *first*. The plaintiff prayed for relief, and an injunction prohibiting the sale of the twenty-six acres till after the rest of the land embraced in the Barton mortgage had been sold. The affidavit, which was placed before the officer who allowed the injunction, omitted all mention of the division of the premises, and the taking of the Barton lot by Geere *subject to the payment of the Barton mortgage*, and of the sale of the twenty-six acres by the plaintiff; and rested solely on the allegation, that the twenty-six acres of the plaintiff's individual property had been mortgaged for the joint benefit of the plaintiff and Geere; and was now threatened to be sold to pay a joint debt. The motion was made on affidavits, alleging that the twenty-six acres were included in the Barton mortgage for the reason that the additional \$150 was the

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Minor agt. Terry, Reader and Geere.

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*private debt* of the plaintiff, and equitably should be satisfied out of the twenty-six acres.

J. A. SPENCER and L. D. CARPENTER, *for the Motion*.  
BACON & WHITE, *Opposed*.

GRIDLEY, Justice.—The first proposition on which the defendants ask to have the injunction in this case dissolved is, that the ground stated in the affidavit fails when it appears that the plaintiff has parted with his twenty-six acres of land, and it is insisted that he can not resort to the additional fact that Geere purchased the Barton lot, *subject to the payment* of all incumbrances. This reasoning proceeds on the principle stated by Justice SILL in the case of Millikin agt. Carys (5 *Howard*, 272) that the complaint though positively sworn to, can not be used as an affidavit for the purpose of obtaining an injunction. With great respect for the opinions of Justice SILL, I can not concur with him in this conclusion. His views, in respect to the principles of pleading in suits in equity may be right, or they may be wrong. It is possible that it is not competent *now* to set up all the minute circumstances that formerly might have been embraced in a bill in equity, in a complaint under the present system. But it must be remembered that what the Code has abolished is the *action for discovery* in aid of the prosecution of another action (*Code*, § 389). In the same action you may, under the present system, obtain a discovery under oath as to all the facts which may be legitimately stated in a pleading, it is enacted that every material allegation in a pleading, not specifically controverted, is *admitted* for the purposes of the action (*Code*, § 168). It should not be forgotten that a complaint in equity, in some of its important aspects, bears a close analogy to a declaration in the old action on the case. In that action, the plaintiff was accustomed to set out the facts of his case, entitling him to relief particularly and at large, as may be seen by consulting the precedents in *Chitty's Pleading*, in actions on the case for torts, to the person, to personal property and to real property. It may be sufficient to refer to the declarations in actions of slander and libel where special

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Minor agt. Terry, Reader and Geere.

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damages are claimed. The pleader can not content himself by stating the legal conclusion that the defendant uttered actionable words against him, whereby he sustained damages. But he must set out the *particular words*, and in many cases state the *particular circumstances* under which they were uttered; and when special damage is claimed, the *particular way and manner by which* the loss or damage occurred. Under the present system, since the forms of actions are abolished, every action is one upon the case; that is, founded on the particular facts of the case set forth in the complaint. So, in a complaint in equity, in most cases where an injunction is prayed for, it is competent to set out the facts which constitute the foundation of the right, with particularity and minuteness. In many cases the facts are so stated that no additional affidavit beyond that verifying the complaint, will become necessary, except in cases where the plaintiff can not swear to all the facts from positive knowledge. In such a case it was always necessary to have the affidavit of a third person. It seems to me, that where the complaint states all the facts necessary to lay the foundation for an injunction, and the plaintiff swears to this positively, it is too narrow a construction of the Code, not to regard the complaint thus verified, as an affidavit. It would be a useless act to restate all the facts, of the complaint over again in the form of an affidavit; and I can not think the legislature intended it to be done. The opinion of Justice SILL is adverse to the decisions in Roome agt. Webb (3 How. Pr. R. 327), Krom agt. Hogan (4 *id.* 225), and Schoonmaker agt. Dutch Church (5 *id.* 265), and in my judgment is founded on too great a refinement in the construction of the statute.

2. The plaintiff's counsel insists that in and by the conveyance of Barton to Geere, the premises were conveyed subject to the payment of the \$531.50, secured by the Barton mortgage. If that be the true construction of the language contained in the deed, then, the conveyance amounts to an agreement between Geere and the plaintiff, that Geere should assume and pay off the same. And, in general, "a conveyance, subject to a mortgage" is held to mean "subject to the PAYMENT of such mortgage," un-



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Minor agt. Terry, Reader and Geere.

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less there be something to indicate a different intention (Jumel vs. Jumel, 7 Paige, 591, 594, 595; see also 9 Paige, 432, Curtis vs. Tyler; Haley vs. Reed, *id.* 446; 2 Barb. Ch. R. 618). If this conveyance thus warrants the construction put upon it by the plaintiff's counsel, it becomes, as evidence, a controlling fact, and is not to be contradicted by parol proof, except with a view of reforming the instrument. On an examination of the deed, however, especially when taken in connexion with the covenant of warranty, I do not think it can be regarded as a *conveyance of the land subject to the payment of the Barton mortgage*. It may have possibly been so intended, but it is not so expressed as to bear that legal construction. The phrase in question is not inserted as a part of the granting clause of the deed, but is a simple recital in an independent sentence as follows: "The above described premises are subject to a mortgage to David Barton and Benjamin Sweet." After which follows the usual covenant of warranty against all incumbrances. The language of the deed is not, that the premises are CONVEYED *subject to the mortgage*, thus making it a *condition* of the conveyance, and a part of the *agreement*; but it amounts only to the statement of a fact, which is not inconsistent with the covenant afterwards inserted. Such, I think, is the legal construction of the deed, which leaves the question litigated on this motion open to parol proof, without incurring the objection of contradicting a sealed instrument.

3. The ground on which the affidavit of the defendants place the merits of this motion is, that when the joint purchase was made of Sweet, and the deed was executed by Barton, there was a sum to be paid on the other lot, which Geere and the plaintiff agreed to *pay down*; and that Geere paid his part down, which left the plaintiff to pay \$100 of this sum from his private funds, and that he borrowed of Barton the \$100, and \$50 more, making \$150, which was his private debt to pay; and that for that reason he put in the mortgage his own twenty-six acres to secure this \$150, as his own individual debt, which it really was, and that the mortgage was drawn, embracing the twenty-six acres and the \$150 of his private debt, to save the giving of two mortgages.

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Minor agt. Terry, Reader and Geere.

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Under the old system, a *responsive answer, positively sworn to*, where there were no suspicious circumstances, entitled the defendant to a dissolution of the injunction (1 *J. Ch. Rep.* 211; 2 *id.* 202; 4 *id.* 26; 4 *Paige*, 111; 1 *Paige*, 164). And this, notwithstanding the plaintiff might have witnesses to prove the equity of his bill. Under the present practice, where the motion is made on affidavits and may be opposed by affidavits of any number of witnesses, it becomes a matter of judicial discretion, whether to dissolve the injunction or not. It may, however, be laid down as a general rule, that where the plaintiff has an opportunity to answer the affidavits produced on the part of the defendant by the affidavits of his witnesses, as well as his own, and fails to make a successful answer to the motion, the balance of the evidence being *decidedly* in favor of the defendants, the motion to dissolve the injunction will be granted. It will be regarded as an additional reason for granting the motion, that the main facts on which the motion is opposed, are sworn to only by the plaintiff, who can not be a witness on the trial, and his statement is contradictory to that of several persons who are competent witnesses.

Such, I am compelled to say, is the case with this motion. Geere swears to all the facts from absolute knowledge. Mr. Barton swears to the fact of the giving of the mortgage; that the plaintiff's twenty-six acres were included to save the necessity of giving two mortgages to secure the \$150, which the plaintiff admitted distinctly to be his own private debt. Reader swears to a distinct admission by the plaintiff, that the \$150 parcel of the \$531.50 mortgage was his own debt to pay. And Asa Geere, Calvin Bently and William W. Smith, swear to the same admission. This allegation, thus fortified by so many witnesses, is *denied* by the plaintiff alone; and the plaintiff on the trial can not be a witness. The only other affidavits on the part of the plaintiff are made by persons who heard Geere *say* that he had taken the Barton lot subject to the Barton mortgage. This he admits to be true; but insists that by the Barton mortgage, he only meant the \$381.50, which was the true consideration and

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Milliken and others agt. Byerly.

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balance of the purchase price of the Barton lot, and did not embrace the private debt of Minor; which he regarded as chargeable on the twenty-six acres of Minor's individual property. It certainly is not probable that Minor should include his private property to secure a joint demand of himself and Geere, when, if the Barton lot alone was not adequate security, there is no question that the Barton lot and Dean lot together, were an abundant security.

The motion must be granted, so far as to allow the sale of enough of the twenty-six acres to raise the \$150 and interest, and costs of foreclosure.

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SUPREME COURT.

MILLIKEN AND OTHERS agt. BYERLY.

A commission merchant who is to sell and guaranty payment, and collect the debt, is liable after the debt is due, without a demand from the purchaser. He differs from one who merely guarantees a debt which the creditor is to collect, in the latter case a demand of the principal debtor is necessary to make the guarantor liable.

*New York Special Term, October 1851. Motion for judgment on account of the frivolousness of the demurrer.* The complaint shows that the defendant received goods from the plaintiffs to sell as a commission merchant for them, and that he was to guaranty the sales; that he rendered an account of the sales showing that part of them were due 20th April 1851, the rest on the 4th June or 23d June 1851. That after the account was rendered the plaintiffs demanded payment of the defendant, but that he neglected to pay, and that the *whole is now due* from the defendant to the plaintiffs.

— — —, *for Motion.*

— — —, *Opposed.*

MITCHELL, Justice.—The defendant demurs; and now alleges that the complaint should have shown a default in the purchaser

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Milliken and others agt. Byerly.

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This is not specifically alleged; but if the purchaser were not in default then he has paid the defendant, and then clearly the defendant is liable; if the purchaser is in default it is admitted that the defendant is liable. The commission merchant who is to sell and guaranty payment, and is *to collect the debt* himself, differs from one who merely guarantees a debt which the creditor is to collect; in this last case it may well be that a demand of the principal debtor is necessary to make the guarantor liable.

The allegation that the defendant has sold the goods, and that the *whole is due*, together with the account showing the sales to have been made on 1st October at eight months, show sufficiently that the whole cause of action accrued before 18th June 1851, when the suit was commenced.

Judgment to be entered for plaintiffs on demurrer unless defendant make affidavit of merits showing the nature of his defence.

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### SUPREME COURT.

In the matter of the petition of GEORGE PADDOCK and another, for the removal of DRAKE B. PALMER, Trustee.

The court may remove trustees and receivers, for *insolvency*, but is not bound to do so. And especially an application for a removal on such ground should be denied, where it appears there is no other valid objection, and the *insolvency* existed and was known to the parties previous to the appointment.

MITCHELL, Justice.—The causes alleged by the petitioners for the removal of the trustee are that he is insolvent, an inebriate, and notoriously immoral, and that he has threatened to violate the trusts.

The affidavits in opposition to the petition fully repel the charge of inebriety and immorality, and show that the numerous and respectable parties making them, believe him fully competent to execute the trust.

The specifications of breaches of trust are in selling white pine joists and beams, and Georgia pine, below the fair market price. The opposing affidavits show clearly that the articles sold were



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Paddock agt. Palmer.

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of inferior quality and therefore sold for less than the market price for better articles of the same kind.

The threat to violate the trusts is denied, and disproved so far as such a matter can be disproved. There is no allegation that such sales were made intentionally too low.

The insolvency of the trustee is admitted; but it seems probable that that was known to the petitioners before they appointed him; they had had a slight acquaintance with him before; they had asked him to act, and he at first declined, and they repeated their request, and he then yielded to their solicitation after consulting his friends.

The insolvency existed before his appointment, and has not accrued since; and after they knew all that they now know of the trustee, they or one of them, consented to his continuance on condition that Mr. Rockwell, his agent, should deposit all moneys collected by him in bank, to the credit of W. W. Scrugham, Esq. as attorney for Mr. Palmer, trustee.

This arrangement was suggested by Mr. Kimball, the attorney for the creditor whose claim is nearly 9-11ths of the whole amount due, and all, or nearly all the other creditors express their desire that the trustee should continue in office.

Under these circumstances the petitioners have no cause to make the insolvency of the trustee a ground for his removal. The court *may* remove for insolvency, but is not bound to do so; and there are many receivers and trustees who are insolvent, but in whose hands the trust fund is safer than with some others who are men of wealth.

Here, too, the petitioners, although they have an interest in having a good trustee appointed, are not so much concerned in that matter as their creditors; their estate is not valued by themselves at more than \$12,000, and the debts are over \$11,000, without interest; and if Lyon's claim for \$2,100, is good, are over \$13,000. It is true that the majority in interest is not to control the court in such a matter, but it has great weight as *evidence* of what is most expedient.

The motion to remove the trustee is denied, with \$10 costs to the trustee.

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Holmes agt. Slocum.

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## SUPREME COURT.

HOLMES agt. SLOCUM.

A referee has no authority to report that the defendant is entitled to judgment of a dismissal of the complaint.

He has no power to dismiss a complaint and turn a party out of court, for unreasonable neglect to proceed in the cause. Nor to order an amendment of the pleadings or to change the issue which the court has sent to be tried.

*It seems*, that the practice to compel a plaintiff to bring a cause to a hearing before a referee, should be the same under the general provisions of rule 92, as under the rules (43) of 1847. The rules of 1849 making no specific provision in such cases.

*Yates Circuit and Special Term, October 1851. Motion to set aside report of referee for irregularity.* The action was brought to recover on an account and was referred by stipulation. The defendant noticed the cause for hearing before the referee for the 10th of July, and it was postponed by stipulation to the 21st of July. On the latter day the plaintiff served an order staying proceedings which the defendant disregarded. The plaintiff did not attend before the referee to try the cause. The defendant appeared and the referee reported "that the defendant is entitled to judgment of a dismissal of the complaint."

R. P. WISNER, *for Motion.*

W. H. KELSEY, *Opposed.*

JOHNSON, Justice.—The affidavits do not show that the report of the referee has been filed, nor that any attempt has been made to enter any judgment upon it or to use it in any way to affect the plaintiff's right to proceed with his cause. It is clear that this is no report upon which any judgment could be entered as a matter of course.

The report of the referee upon *the whole issue* stands as the decision of the court and judgment may be entered thereon in the same manner as if the action had been tried by the court (*Code*, § 272; *Rule 24*). This is no report upon the whole issue or any part of it, and consequently no judgment of any kind could be rendered upon it without application to the court upon motion and notice.

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Holmes agt. Slocum.

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Where a cause is referred to a referee to hear and decide the whole issue, he is invested with all the necessary power and authority over the cause and over the parties to enable him to hear and determine every thing which properly belongs to the trial of a cause. He is to try the issue which the court sends to him to be tried. But for every other purpose the action and the parties remain in court. The referee has no right to order an amendment of the pleadings or to change the issue which the court has sent to be tried. Nor can he dismiss a complaint and turn a plaintiff out of court for unreasonable neglect to proceed in the cause.

These are mere matters of practice which belong solely to the court and over which the referee has no jurisdiction.

The power of a referee in regard to causes referred to him to hear and decide is not essentially enlarged or altered by the Code, § 421. And surely it was never heard that a referee could render judgment as in case of non suit or make any order in a cause upon which such a judgment could be entered of course. The dismissal of the complaint is equivalent to judgment as in case of non suit under the former practice, and is a substitute for it.

It is said this practice has prevailed to a considerable extent since the Code, but it is clearly unauthorized, and should be corrected. But, it is asked, how is the defendant to compel the plaintiff to proceed in the action after it is referred?

Rule 23 provides that the defendant may move for a dismissal of the complaint whenever an issue of fact is joined and the plaintiff shall fail to bring the same to trial according to the course and practice of the court (see also *Code*, § 274). Before the rules of 1849, "the course and practice of the court" in regard to cases referred was this. If the plaintiff did not bring the same to a hearing within forty days after the reference was ordered, the defendant was at liberty to serve him with a notice requiring him to bring the cause to a hearing within forty days thereafter, and if the plaintiff failed to comply the defendant moved for judgment as in case of non suit (*Rule 43 of Rules of 1847; Rules of 1845*). As the rules of 1849 make no specific provision upon this subject. I apprehend the former practice is still in force under the general provisions of rule 92. Formerly,

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Holmes agt. Slocum.

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if the plaintiff did not proceed and bring his cause to a hearing, the defendant applied to the court for leave to notice the same for hearing on his part, and if on such notice the plaintiff failed to appear, the defendant proceeded before the referee and might take a report that nothing was due the plaintiff, or if he claimed any thing to be due him by the pleadings, introduce his evidence and take the report in his favor for the amount proved to be due (*Bissell vs. Lee*, 16 *Johns.* 45; *Shelden vs. Erie C. P.*, 12 *Wend.* 268). But this was changed by the rules of 1845.

It is unnecessary to examine the question whether a defendant can notice a cause for trial before a referee in this case, as it was adjourned by stipulation. Section 256 of the Code, which authorizes either party to give notice of trial at least ten days *before the court*, and furnish the clerk with a note of issue seems to relate exclusively to issues to be tried at the circuit; and section 258 of the Code, which authorizes the party giving the notice to bring the issue to trial and in the absence of the adverse party to proceed with his case and take a dismissal of the complaint, unless *the court* for good cause otherwise direct, clearly has no reference to a trial before a referee.

But I can see no necessity for making this motion. It is clear that a referee can not turn a party out of court, and any attempt on his part to do so would be a mere nullity. He may nonsuit a plaintiff upon a trial because his proof does not sustain his cause of action; but that is a decision upon the merits on the trial of the issue, and has nothing to do with the question before us. Should the defendant attempt to enter judgment on this report without notice to the plaintiff the court would interfere and set the order or judgment aside as irregular.

But for aught that is made to appear, the plaintiff may now proceed with his cause before the referee. It has not been heard or decided. There has been no trial and no decision except upon a mere question of practice. Perhaps, however, to avoid all question as to the right of the plaintiff still to proceed with his cause before the referee, it is better to order this report to be set aside, and all subsequent proceedings, if any have been had.

Ordered accordingly.



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Harris agt. Bennett.

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## SUPREME COURT.

HARRIS agt. BENNETT.

Where a plaintiff, after suit brought, transfers his interest, the assignee should not be allowed to be substituted as plaintiff where the object principally is to make the original plaintiff a witness.

Under § 121 the court possess a discretionary power in such cases.

*New York Special Term, Nov. 1851. Motion by assignee to be substituted as plaintiff, and for leave to continue suit in his name.* After this action was commenced the plaintiff assigned his interest in the claim to his brother, who assigned it to Mr. Clarke, brother of the plaintiff's attorney.

Subsequently a report of referees, after a long contest, was made in favor of the plaintiff, but was set aside on account of the admission of improper evidence.

— —, *for Motion.*

— —, *Opposed.*

MITCHELL, Justice.—The assignee now moves to be made plaintiff in the suit, and that the suit may be continued in his name. It sufficiently appears that the plaintiff is insolvent, and that the assignee is better security for costs than the plaintiff.

But the defendant alleges, and the plaintiff's attorney substantially admits that the object of the motion is to make the plaintiff a witness, and so sustain a case which it was difficult for the plaintiff to make out before. Such an object ought not to be favored; if it were, every plaintiff when he found his case could not be otherwise sustained, would thus make himself a witness.

The Code, § 121, directs that in case of a transfer of interest (otherwise than by marriage, death or disability of the party), the action *shall* be continued in the name of the original party. This is imperative and allows no change; but it adds the court *may* allow the person to whom the transfer is made, to be substituted. This last is permissive only, and gives a discretion to the court which is intended to be exercised only as the ends of justice may require.

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Howell agt. Fraser and others.

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It would not be just to allow it absolutely in this case; the plaintiff would make out his whole case, and the defendant might know nothing about it.

The motion can be granted only on condition that it be stipulated that the present plaintiff shall not be examined as a witness. On that stipulation it may be granted. The costs are to abide the event.

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### SUPREME COURT.

HOWELL agt. FRASER AND OTHERS.

An allegation that the party "*believes*" a fact to exist, is equal to an allegation that the fact exists, "*as he believes*"; and where the law allows a statement on belief, either form of expression is equally an allegation of such fact. If a pleading is correct in substance, but not in form, the remedy is by motion not by *demurrer*.

*New York Special Term, Nov. 1851. Motion for judgment on account of the frivolousness of the demurrer.* The complaint is on a promissory note against maker and indorsers, and alleges the presentment to the maker and notice to the indorsers, in this way: "he *believes* that when the said note became due and payable it was duly presented for payment, and payment thereof was duly demanded, but the same was not paid; and that due notice thereof was given to the defendants, the indorsers."

—— —, *for Motion.*

—— —, *Opposed.*

MITCHELL, Justice.—The defendants demur, and say that there is no allegation of presentment or notice; the reason assigned for this cause of demurrer is because the complaint states that the plaintiff believes that the note was presented, &c.; and it does not aver that the note was presented *as* the plaintiff believes, or is informed and believes; and it is said that this is an attempt to put in issue the plaintiff's *belief*, and not the fact that the note was presented.

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Howell agt. Fraser and others.

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This is an objection merely to the form of expression which the plaintiff uses in his averment; it is to the phraseology of the plaintiff, and to no matter of substance.

A statement that a fact exists as the party believes, is no more an averment of its existence than a statement that he believes it to exist; in each case it is a statement only of his belief, or on his belief; and where the law allows a statement on belief, either form of expression is equally an allegation of such fact.

It might as well be said that if the complaint were that the plaintiff positively avers or says, on his own knowledge, that the presentment was duly made, that this tendered an issue on the plaintiff's saying so, or on his averring so, and not on the fact of the presentment, as that the form used tendered an averment on the belief.

If a pleading is correct in substance, but not in form, the remedy is not by demurrer, but by motion to make it more certain or definite, or by some other way than demurrer. The Code never was intended that judgment should be given against a party who has merits, for a matter of mere form.

It directs the court, in every stage of the action, to disregard any error or defect in the pleadings which shall not affect the substantial rights of the adverse party (§ 176). It would be hard to show how the substantial rights of the defendants are injured by the mode of pleading adopted, any more than by the one which he suggests.

The motion for judgment on account of the frivolousness of the demurrer is allowed, with ten dollars costs.

New York and Erie Rail Road Co. Respondents agt. Coburn Appellant.

SUPREME COURT.

THE NEW YORK AND ERIE RAIL ROAD COMPANY Respondents agt.  
COBURN Appellant.

Where commissioners of appraisal, under the 16th section of the general Rail Road act passed April 2, 1850, make a report of their proceedings; on appeal to the court under the 18th section, no affidavits can be read on the review of such an appeal; the court must act solely upon the report of the commissioners. (*This agrees with the decision upon this point in N. Y. and Erie R. R. Co. agt. Corey & Smith, 5 How. Pr. R. 181.*)

The appeal given by the 18th section declares that "on the hearing of such appeal, the court may direct a new appraisal before the same or new commissioners, &c." This does not entitle a party as a matter of right to a second hearing and appraisal. The word "*may*," should not be construed, in this act as imperative, that is, equal to "*shall*" or "*must*."

*Erie Special Term, August 1851.* At the last February special term, upon the petition of the respondents, commissioners were appointed to ascertain and appraise the compensation to be made to the appellant, for real estate proposed to be taken by the said company for their road. The commissioners made their report, and at the May term it was confirmed. Within twenty days thereafter Coburn gave notice that he appealed from the appraisal and report, and stipulated not to disturb the possession of the respondents. The appeal came on to be heard at the August special term upon notice, and the appellant also served copies of affidavits with notice that they would be read upon the hearing. No objection was taken to the form or sufficiency of the report of the commissioners. The appellant insisted, as a matter of right, that the court was bound to direct a new appraisal. He also offered to read affidavits to show that the compensation awarded was too low. The counsel for the respondents objected to the reading of affidavits. The court heard affidavits upon both sides, reserving the question of their admissibility.

E. MULLETT, *for Appellant.*

TH. P. GROSVENOR, *for Respondents.*

MARVIN, Justice.—This appeal is given by the 18th section of the general rail road act, passed April 2, 1850.

The act declares that "on the hearing of such appeal, the court



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may direct a new appraisal before the same or new commissioners in its discretion." The affidavits can not be read upon the appeal. The appeal is from the "appraisal and report of the commissioners." It brings up their appraisal and the proceedings before them as contained in their report; and the proceedings are to be reviewed upon the report. It seems from the remarks of Justice WELLES in N. Y. and E. R. R. Co. agt. Cory & Smith (5 *How. Pr. R.* 181), that this has been so held at a general term in the 7th district.

No authority is given to the court to receive affidavits or further evidence.

The appellant insists that he is entitled as a matter of right, to a new appraisal. The language of the statute is "the court *may* direct a new appraisal." This is not imperative. The word *may*, when used in a statute, is sometimes construed as meaning *shall* or *must*.

Chancellor Kent, after examining the English cases says, "in respect to statutes the rule of construction seems to be, that the word *may* means *must* or *shall*, only in cases where the public interest and rights are concerned, and where the public or third persons have a claim *de jure*, that the power should be exercised" (Newburgh Turnpike Co. vs. Miller, 5 *J. Ch. R.* 113; see also Malcom vs. Rogers, 5 *Cow. R.* 188; Mayor of N. Y. vs. Furze, 3 *Hill*, 612; Minor vs. Mechanics' Bank of Alexandria, 1 *Pet.* 64). In the last case the rule stated makes it proper to construe *may*, when used in a statute, as meaning *must* "in all cases where the legislature mean to impose a positive and absolute duty, and not merely to give a discretionary power." It is added, "but no general rule can be laid down upon this subject, further than that exposition ought to be adopted in this as in other cases, which carries into effect the true intent and object of the enactment. The ordinary meaning of the language must be presumed to be intended, unless it would manifestly defeat the object of the provisions."

In the present case it is insisted that the legislature intended in all cases to give to the land owner the right of a *new appraisal*,

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and that such intention is evidenced by the general scope and provisions of the act. The 14th section authorizes the company to present a petition to the court, and declares what allegations it shall contain, and the practice to be adopted. By the 15th section, those interested in the land may show cause against the prayer of the petition, and may disprove any of the facts alleged in it. The 16th section prescribes the duties of the commissioners, and directs that they make a *report of the proceedings* before them, with the minutes of the testimony, taken by them, if any. By the 17th section the report, if conformable to the provisions of the act, is to be confirmed. The 18th section gives the appeal, and upon the hearing the court may direct a new appraisal. The second report is to be final and conclusive upon all the parties interested. If the amount of compensation is diminished by the second report, the appellant is to refund the difference. It is argued that these provisions indicate an intention to give the land owner a second hearing before commissioners, at the risk of having the amount of the first appraisal reduced. I am not able to see any thing in these provisions indicating the intention of the legislature that a second appraisal may be claimed as a matter of right.

The statute carefully guards the rights of the land owner. The duties of the commissioners are clearly defined. They are to view the premises and to hear the proofs and allegations of the parties and reduce the testimony taken by them to writing. The party whose land is to be taken has here a full opportunity to be heard—a complete trial. He may call and examine witnesses, and their evidence is to be preserved and reported to the court. If he appeals, the court will review the proceedings of the commissioners. This will include their decisions and an examination of the evidence. Errors may have been committed by the commissioners which may appear from their report, but which could not be raised as objections to its confirmation. These are to be considered upon the appeal.

Every party has a right to be once heard, but I know of no principle giving him the right to demand a second hearing or

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trial, when no error has been committed upon the first, unless such right is expressly given by statute. In those cases generally where *may* has been construed as imperative the public or private persons have had rights and interests, which could not be secured to them, without an exercise of the power conferred upon some officer, court or body, and in such cases the exercise of the power becomes a duty, and the language of the statute is construed as imperative (see cases above cited).

The appellant has had one appraisal and he can not, as a matter of right, have another. He alleges no error in the report of the commissioners. He called and examined several witnesses, and their evidence is contained in the report. None were called by the respondents. He does not claim that the compensation awarded, was not in accordance with the evidence, but he can now produce witnesses upon whose evidence he supposes the commissioners would allow him a greater compensation.

A new appraisal should not be directed.

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## SUPREME COURT.

THE SCHENECTADY AND SARATOGA PLANK ROAD CO. agt. THATCHER.

A bill of exceptions when *attached* to the judgment roll, becomes a part of it by the last clause of § 264. Therefore a judgment roll with the bill of exceptions attached is equally sufficient with one where the bill of exceptions is incorporated in the roll.

The clerk must enter in the judgment book "*the judgment*" as required by § 280 in cases where the decision of the court is given in writing and filed under § 267, as in all other cases; and must insert a copy of such judgment in the judgment roll in making it up, and sign the same.

A "*bill of costs*," "*notice of adjustment*," "*affidavit of disbursements and attendance of witnesses*," are papers which do not constitute any part of a judgment roll, and should not be attached, as they unnecessarily encumber it.

— *Special Term*, — 1851. *Motion to set aside judgment roll for irregularity.* The action was tried before the circuit judge, a trial by jury having been waived. The judge having made his decision in favor of the plaintiffs, judgment was per-

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fectured thereon on the 4th of October 1851. Notice that judgment had been entered, was served on the defendant's attorney on the 6th of October 1851, and on the next day the defendant's attorney served the necessary papers for an appeal. Exceptions had been taken upon the trial and before the judgment was entered a bill of exceptions had been signed and sealed and filed with the clerk. In making up the judgment roll the bill of exceptions was omitted. The roll consisted of the summons, complaint, answer, reply, judges decision, *bill of costs, notice of adjustment and affidavits of disbursements and attendance of witnesses*. No judgment was attached to the roll, except the decision of the judge, nor was the roll signed by the clerk. Upon these facts the defendant's attorney moves to set aside the judgment roll, or that the same be amended in the particulars specified.

P. POTTER, *for Plaintiffs*.

W. L. LEARNED, *for Defendant*.

HARRIS, Justice.—It appears by the affidavit of the defendant's attorney, that the bill of exceptions has already been attached to the judgment roll. Under the provision contained in the last clause of the 264th section of the Code, it became when attached, a part of the roll.

But the more important question involved in this motion relates to the form of entering judgment. The clerk, as appears from the affidavit read in opposition to the motion, has supposed that in a case like this, where the decision of the judge is made in writing and filed, such decision is a sufficient judgment to answer the requirements of the statute. Judging from the rolls returned upon appeals, and which have come within my own notice, I am inclined to think this no uncommon error. The 279th section of the Code requires the clerk to keep a book for *the entry of judgments*. The succeeding section prescribes the entry which shall be made in the *judgment book*. It must specify clearly the relief granted, or other determination of the action." Excellent forms for these entries have been prepared by Mr. Monell, and may be found in his book of practice, p. 479,



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*et seq.* Until judgment is thus entered, the clerk is not authorized to make up the judgment roll. The statute requires him "immediately after entering the judgment," to proceed to make up the roll, and among the papers necessary to constitute a complete judgment roll, is "a copy of the judgment," that is a copy of the entry of the judgment made by the clerk in the judgment book. Such entry in the judgment book and copy in the roll is the only record evidence that judgment has been perfected. The judgment roll in this case is defective in this respect. It contains the decision in writing required by the 267th section of the Code, but not the judgment to be entered thereon as required by the same section.

The clerk also erred in attaching to the roll the bill of costs, the notice of adjustment, and the affidavit of disbursements and attendance of witnesses. These, properly, constitute no part of the roll, and it subjects the parties to unnecessary expense, and is a great inconvenience to the court having occasion to review the proceedings, to have the record encumbered by such useless matter. In the entry of judgment to be made by the clerk, he is required by the 311th section of the Code, to insert "*the sum of the charges for costs, &c.*" The *amount only* is to be inserted, and not the papers necessarily used in ascertaining such amount.

There must be an order directing the clerk of Schenectady, in case he has not already done so, to make an entry of the judgment in this action in the judgment book kept by him, and to attach a copy of such entry to the judgment roll, which should be signed by him. The papers used upon the adjustment of costs must be detached, as constituting no part of the roll. Neither party is to have costs against the other upon this motion.

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Howe agt. Peckham.

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## SUPREME COURT.

HOWE agt. PECKHAM.

The 167th section of the Code does not authorize the *severing* of a single cause of action.

*It seems*, that the legislature in using the term "several causes of action" in this section, must have had reference to the causes of action as they were then founded, limited and defined by the common law.

Where the plaintiff sued the defendant in an action for *negligence* in allowing the defendant's team to run away, by which the plaintiff's horse and wagon were run over, and his wagon broken, the horse damaged and the plaintiff personally injured; on demurrer to the complaint for uniting different causes of action, to wit: injuries to the person and injuries to the property as classed by § 167, *held* that *negligence* was the *ground* of the action; and the damages both to the plaintiff's person and his property resulted from the alleged negligence, and was but one act and constituted but one cause of action.

*Special Term, October 1851. Demurrer to Complaint.* The complaint alleged that the plaintiff was driving along the highway, in a one horse wagon; that a short distance behind the plaintiff a person was driving a team, drawing a two horse wagon and travelling in the same direction the plaintiff was; that a short distance behind this person, was the defendant's team, drawing a two horse sled, and travelling in the same direction. That the defendant carelessly and negligently left his team to go along the said highway without any driver, and went and got into the wagon with said person, so driving between the plaintiff and defendant's team, and rode with said person; and that said team of defendant being so left, started into a run, and run over the plaintiff, his horse and wagon; injured the plaintiff's person, broke the wagon and harness, and damaged the horse. The complaint, at the conclusion of the statement of the cause of action, averred that the injuries were occasioned by the "*gross and wilful carelessness and negligence of defendant.*"

A. N. SHELDON, for the defendant. The complaint is drawn in violation of the 167th section of the Code. It contains two distinct and separate causes of action within the meaning of this section, to wit: injuries to *the person* and injuries to *the property* of the plaintiff (*Monell's Practice*, 46 to 48).

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Howe agt. Peckham.

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Before the Code, actions were distinguished by their form; now the forms of actions are abolished (*Code*, § 60). But while the Code has abolished these forms of actions, it has created, or preserved in fact, a distinction in one respect as to the forms of actions, and that is as to the *joinder of causes of action*; and these different divisions, made by the section in question can not be joined any more than could assumpsit and trespass heretofore. As to this point, the rule is still in force, that, "it is no matter that the causes of action relate to the same subject matter or require the same evidence to support them" (21 *Wen. R.* 29). And again, the complaint claims damages upon both of these causes of action, and they should have been separately stated (4 *How. Pr. R.* 226).

H. C. GOODWIN and J. P. WHITEMORE, for the plaintiff. The complaint contains but one cause of action, which is properly stated (14 *Johns.* 433; 10 *Wend.* 324; 1 *Chitty's Pl.* 128-26; 25 *Eng. Com. Law.* 52). Negligence is of itself the subject of an action (10 *Bing.* 112).

Where a plaintiff sues for negligence he can set forth in the complaint and recover for all the damages that are the result of the negligence complained of (3 *Barb. Sup. C. R.* 48).

The complaint is good under the Code; negligence is the subject of an action (*Code* § 69; 4 *How. Pr. R.* 228).

If a single count under the old system had contained all that is contained in this complaint, it would have been good. The rule applicable to a single count applies to a complaint (10 *Bing.* 112; 25 *Eng. Com. L.* 50; 5 *Barb.* 337; 4 *B. & C.* 223; 5 *Car. & P.* 190). The complaint does not charge the defendant with committing the act wilfully.

MASON, Justice.—There is no doubt in my mind in this case but that the complaint states a cause of action in case, or what would have been an action upon the case under the former system of pleading and upon the principles of the common law. It is a complaint in which the plaintiff has made the negligence of the defendant the ground of action, and in which the damages

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Howe agt. Peckham.

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both to the plaintiff's person and his property are claimed as a consequence of the negligence, or as resulting from the negligence complained of.

This was a familiar mode of declaring under our former system, for the rule is well settled by a long series of adjudications, both in England and in this country, that in this class of cases if it appears that the injury was attributable to negligence, though it were immediate, the party injured has an election either to treat the negligence of the defendant as the cause of action and to declare in case, or to consider the act itself as the injury, and declare in trespass (*Williams vs. Holland*, 10 *Bing. R.* 112, 117; *Blin vs. Campbell*, 14 *J. R.* 433; *Wilson vs. Smith*, 10 *W. R.* 328; 1 *Chitty's Pl.* 127, 128).

And it should be borne in mind that where the injury resulted from the one negligent act of the party, as in the present case, that it constituted but one cause of action. The running against the plaintiff's carriage in the highway and breaking it, and upsetting the plaintiff and injuring him by the careless negligence of the defendant never constituted but one cause of action, and in which the plaintiff recovered his damages as well for his personal injury as for the injury to his property. This is a salutary rule, for when an injury has resulted both to the person and the property of the plaintiff from one single act of negligence of the defendant the law ought not to be guilty of so great folly as to compel the plaintiff to sustain the burden and expense of two suits to recover his damages; and the courts which have been so fastidious to avoid circuity of action ought not to require it unless the innovating spirit of the legislature has required it by the passage of a statute which compels the courts thus to divide up claims for damages resulting from a single act. The defendant's counsel insists that the 167th section of the Code imposes this rule upon the courts. I feel constrained to say, however, after a most careful examination of this statute and the best deliberation which I have been able to bestow upon the case that I do not think that this statute has the effect which the council for defendant attributes to it. The section reads as follows: "The



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Howe agt. Peckham.

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plaintiff may unite several causes of action in the same complaint when they all arise out of, 1. Contract, express or implied. 2. Injuries with or without force to the person. 3. Injuries with or without force to the property," &c. &c., and then follows this provision: "But the causes of action so united must all belong to one only of these classes," &c. I do not discover any thing in this section which requires a plaintiff to sever a single cause of action. The demurrer in this cause is not well taken, in my opinion, for the reason that the plaintiff has not united several causes of action in the same complaint. He has only stated one cause of action. This section was never intended, it seems to me, to sever a cause of action like that set forth in the complaint. The legislature in using the term "*several causes of action*," in this section, must have had reference to the causes of action as they were then founded, limited and defined by the common law; for there was no other resort to ascertain what constituted a cause of action.

The rule is a familiar one that statutes are to be construed in reference to the principles of the common law in force at the time of their passage, for it is not to be presumed that the legislature intended to make any innovation upon the common law farther than the case absolutely required (4 *Kent. Com.* 464, 3d ed). This 167th section instead of severing causes of action as they existed at the time of the passage of the statute, and thereby creating a multiplicity of suits was, I have no doubt, intended by the framers thereof to lessen suits and diminish their number by allowing the plaintiff to bring into the same suit and recover his damages for half a dozen, or any greater number of assaults and battery committed upon distinct and different occasions, and so for any other injury to the person, he may join in the same action with assault and battery.

But, again, the Code does not abolish in any manner the causes of action as they existed before the passage of that act, nor does the Code in any manner define what shall constitute a cause of action. It leaves all this matter as it was at common law or in equity before the Code was passed. It is true the 69th section

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Cook and others agt. Rawdon.

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has abolished the forms of the action, but it leaves, as we have before said, the causes of action as they were; and the Code was never intended to trench upon their boundaries so far as the cause of action is concerned. The cause of action in case is as perfectly preserved under the Code, although the form of prosecuting the particular action is abolished, as it existed before the Code, or if it suits the individual of the code language any better we will say the form of the action upon the case is abolished, while the substance of the action in all its elements is most perfectly retained.

If I am right in the opinion above expressed, it follows that the plaintiff must have judgment upon the demurrer and which I hereby order to be entered, with leave to the defendant to answer the complaint on payment of costs.

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SUPREME COURT.

COOK AND OTHERS agt. RAWDON.

- A** guardian of an infant plaintiff should be a *responsible* person, for he is liable for costs (*Code*, § 316).
- It seems**, that part of rule 56, requiring the guardian *ad litem* to be the general guardian, or an attorney, &c. or other officer of the court, does not apply to a guardian for the plaintiff.
- A** guardian for an infant wife, who joins with her husband as plaintiff, is not necessary, unless the action is to recover her separate property.
- It seems**, where the action is to recover her separate property, the husband can not be a guardian or next friend.

*At Chambers, October 1851.*

J. D. WOODWARD applied for the appointment of guardian for three minor plaintiffs who wished to sue to recover land. The affidavits stated the ages of the claimants; their interests; whom they proposed for guardian; that he was husband of one of the minors, and had consented to be guardian of all of them. Nothing appeared as to his responsibility.

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Cook and others agt. Rawdon.

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HAND, Justice.—The guardian as he is now called, of an infant plaintiff, should be a responsible person, for he is liable for costs (*Code*, § 316; *Fulton vs. Roosevelt*, 1 *Paige*, 178; *Willes*, 190; *Dalrymple vs. Lamb*, 3 *Wend.* 424; 2 *Burr. Pr.* 81).

I do not think that part of rule 56, requiring the guardian *ad litem* to be the general guardian or an attorney, &c. or other officer of the court, applies to a guardian for the plaintiff. Mr. Justice WILLES, in *Slaughter vs. Talbot*, said the practice of appointing officers, &c. was probably altered because they would be liable for costs (*Willes*, 190). It might be very difficult to obtain a *pro chien ami* under this rule. This being a suit to recover land, I do not think it necessary to determine whether he can now be compelled, as formerly, to give a bond (see 2 *R. S.* 446, § 5; *Code*, § 469).

But I think it would be better that it should appear, before making the appointment, that he is responsible. Some of the forms of petition are so (3 *Burr. Pr.* 235; *Yate's Forms*, 346; *Monell*, 508; *Hayden*, 352); others not (*Till. Forms*, 232; *Tidd's Forms*, 21; 2 *Barb. C. Pr.* 632). In some cases that was formerly required (*Old Rule*, 163; *Lawrence vs. Lawrence*, 3 *Paige*, 267; *Robertson vs. Robertson*, *id.* 387).

But a guardian for the wife of Campbell is not necessary in this case, if the land is not her separate property. In actions at law to recover it, her husband should sue; and she should be joined, especially if she has a fee, and was ousted before coverture; or if neither of them during coverture have had actual or constructive possession (*Plowd.* 418; 1 *Chit. Pl.* 63 n.; 4 *Vin.* 77-8; 1 *Bac. Ab. Bar. & Feme, k*; 2 *Co.* 61 b; 3 *Co.* 21 b; 2 *Kent* 131; 1 *Bl.* 443 n. 44; *Bing. on Coverture*, 248; *Reeve's Dom. Rel.* 27; *Morse vs. Earl*, 13 *Wend.* 271). Though there is some confusion in the cases (*Salk.* 255; *Weller vs. Baker*, 2 *Wils.* 423; *Willy v. Hawksworth*, *id.* 424; *Frosdick v. Sterling*, 2 *Mod.* 270; *Co. Litt.* 46 b. and note; *Harbin vs. Green*, *Hob.* 189. And see *Jackson vs. Leek*, 19 *Wend.* 339; *Jackson vs. McConnell*, *id.* 181). In case they sue together, no guardian (or *prochain ami*) is necessary, although she be an infant. The husband appoints an

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Mann and others agt. Tyler and others.

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attorney for both (*Code*, § 114; 2 *Saund. R.* 213; *Bing. on Inf.* 123. And see *Hulburt vs. Newell*, 4 *How. P. R.* 93).

If the suit is for her separate property, she must have a next friend, whether she claims a legal or equitable estate (*Code*, § 114; *Grant vs. Van Schoonhoven*, 9 *Paige*, 255; *Stuart vs. Kissam*, 2 *Barb. S. C. R.* 493; *Wade vs. Parker*, 2 *Keene*, 59; 10 *Paige*, 201; 1 *Beav.* 96; *Coit agt. Coit*, 6 *How. Pr. R.* 53.) And it seems that the husband can not be next friend (*id.*). Whether the next friend is liable for costs as a party, under the provisions of the Code in relation to costs, it is not necessary now to decide. He has been considered not properly a party, in some cases in England (*Sinclair vs. Sinclair* 13 *M. & W.* 646; *Morgan vs. Thorne*, 7 *M. & W.* 400. But see *Cowling vs. Ely*, 2 *Stark. n. P. C.* 366; *Webb vs. Smith*, *Ry. & M.* 106).

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## SUPREME COURT.

### MANN AND OTHERS agt. TYLER AND OTHERS.

An allowance for extra costs must be made by the "court," and not by a justice at chambers (*Code*, § 308).

*It seems*, that the application may be made without a formal notice, before the justice at the trial of the cause at the circuit, if he at the same time holds a special term.

When the motion can not, for any cause, be made before the justice trying the cause, it may be made upon notice at a proper term, held by another justice.

#### *Special Term, October 1851.—Extra allowance.*

B. POND, moved before Justice HAND, at his chambers, for an extra allowance of costs. The cause was tried before him without a jury in Albany, in which county the venue was laid, and in April 1850, he gave judgment for plaintiff. The defendant appealed and the judgment was affirmed in September 1851. The affidavits on the part plaintiff showed that the costs had not been taxed, nor the judgment roll filed. None of the parties or their attorneys resided in the fourth judicial district.

C. B. GAY, *Contra*.



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Mann and others agt. Tyler and others.

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HAND, Justice.—Allowances of extra costs must be made by the “court,” and not by a justice at chambers (*Code*, § 308). Perhaps there is no objection to entertaining the application at the time of the trial without a formal notice, if the same judge is then holding a special term. That, I suppose, is what Mr. Justice PARKER intended to say in *Van Rensselaer agt. Kidd* (5 *How.* 242). But if not made then, notice should be given as in other cases. Rule 86 requires the application to be made to the court before which the trial is had or judgment rendered. But after judgment has been rendered in the cause before the single judge, in what would before the Code have been an action at law, he does not, at his chambers, act as court, except in cases prescribed by the statute (*Code*, § 400, 401, 27, 247; *Jud. Act*, § 16, *amendment of* § 16). In other respects the old distinctions between chamber and term duties in actions at law, I suppose are retained (*Code*, § 402, 469, 414; 1 *Burr. Pr.* 348; *Clark v. Judson*, 2 *Barb. S. C. R.* 93). Sections 27 and 400 of the Code have not affected the practice in this respect.

It follows also that this motion can not be made in the county of Essex (*Code*, § 401). Rule 86 does not, in terms, require the motion to be made before the same judge who tried the cause, though that result perhaps was intended, and it is the most convenient practice (*Dyckman agt. McDonald*, 5 *How.* 121; *Van Rensselaer agt. Kidd*, *id.* 252). But the statute controls. When the cause is tried by referees the application must come before this court on motion, upon papers duly served (*Howe agt. Muir*, 4 *How. Pr. R.* 252). *Sackett agt. Ball*, (4 *id.* 71), *Niver agt. Rossman* (5 *id.* 154), *Fox agt. Gould* (*id.* 278), were cases of reference. And where an issue of fact is tried at the circuit, the Supreme Court in which the action is in fact pending, and not the Circuit Court, is “the court” intended by the statute (§ 308. And see § 401). Hardly any step, except to try or refer, can be taken at the circuit in a cause pending in the Supreme Court (2 *R. S.* 201, § 13, 383, § 41; *Const. of 1821*, art. 5, § 5; *Const. of 1846*, art. 6, § 6, 9; *Jud. Act*. § 22; *Code* § 9, 10, 255. And except to grant a new trial on the judge’s minutes (*Code*, § 264). The

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judgment to be entered on the verdict (§ 264, 265) is entered in Supreme Court. A judgment roll containing an entry of judgment in the Circuit Court would be an anomaly. Where the motion can not, for any cause, be made before the judge trying the cause, it may, no doubt, be made at a proper term held by another judge. The remedy of a party given by statute could not be taken away by a rule of court.

The application refused.

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### SUPREME COURT.

TRAPP JR. AND ANOTHER agt. THE N. Y. AND ERIE RAIL ROAD CO.

An action to recover damages for the breach of a special contract, comes within the 1st sub. of § 129 of the Code, and is essentially an action for the *recovery of money only*. (This agrees with the decision in *Williams agt. Miller*, 4 *How. Pr. R.* 94.)

*Tompkins Special Term, November 1851.*

J. MORRIS, *for the Motion.*

FERRIS & CUSHING, *Contra.*

SHANKLAND, Justice.—This motion is to dismiss the complaint, on the ground that it does not correspond with the summons; or rather, that the notice inserted in the summons is not authorized by the 1st subdivision of the 129th section of the Code, because the complaint does not set forth a cause of action arising on contract for the recovery of money only, but is for the recovery of damages for a breach of contract for the non-delivery of a machine sent by the cars of the defendant on the rail road. But the defendant's counsel mistakes the true construction of the 129th section by reading the first subdivision, as if it said "in an action arising on contract for the *payment* of money only," instead of "for the *recovery* of money only," as it does read. It is true, this action is for a breach of a special contract, but nevertheless it seeks the *recovery of money only*, and not any other relief. The case of *Williams agt. Miller* (4 *Howard* 94), was correctly

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decided. This construction is strengthened by the words of § 246, subdivision one, in respect of judgments, on failure to answer.

In actions arising on contract for the *recovery* of money only, if the complaint is verified, the plaintiff takes judgment for the amount demanded in his summons. But if the complaint be not sworn to, and such action is on an *instrument* or the *payment of money only*, the clerk is to assess the amount on its production to him, and in other cases (that is, where the complaint is not sworn to, and is not on a written instrument) the clerk must ascertain the amount of the recovery from the plaintiff's examination on oath, or other proof. Where the complaint is verified, the plaintiff is entitled to a judgment for the amount demanded therein, whether the action is founded on a written instrument or on an unwritten contract, provided the plaintiff seeks to recover money only. The clerk assesses the damages in both cases; but the nature and character of the proof before him, is governed by the fact, whether the action is on a *written* or *unwritten* contract.

This motion must be denied with ten dollars costs.

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### SUPREME COURT.

TROY AND RUTLAND R. R. Co. agt. CLEVELAND AND NINE OTHERS.

On the appointment of commissioners to appraise the damages to the owner of lands to be taken for a Rail Road (*Laws of 1850, ch. 140, § 14, 15, 16*), the parties whose lands are to be appraised, or their attorneys, may in case they appear, name six persons, and the company a like number, but *each owner is not entitled to name six persons.*

The court appoint five of the persons so named, as commissioners (§ 15), who may appraise all the lands proposed to be taken in the county.

And § 16 contemplates a succession of appraisals by the same commissioners. And one report may embrace all the cases.

The court has the power, and may fill more than one commission, when good cause is shown.

*Washington Special Term, June 1851.*

J. H. McFARLAND, moved for the appointment of commissioners to ascertain and appraise the compensation to be made to Cleveland and nine others, owners of land in the town of Salem,

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proposed to be taken by the Troy and Rutland Rail Road Co. for the purposes of their road.

M. FAIRCHILD, for the land owners, insisted that as it appeared they owned the lands separately and none of them had a joint interest in the same parcel, *each* owner should be allowed to name six persons as commissioners of appraisal.

HAND, Justice.—The statute authorizes a joint commission comprehending all the land owners embraced in one petition (*Laws of 1850, ch. 140, § 14, 15, 16*). There is nothing in § 14 that prevents several owners being included in one petition; and by § 15, the court appoint five persons to “ascertain and appraise the compensation to be made to the owners or persons interested in the real estate proposed to be taken in such county for the purposes of the company, &c. And the parties whose lands are to be appraised, or their attorneys may, in case they appear, name six such persons, and the company a like number,” &c. Section 16 also sustains this view of the statute. The commissioners are to “view the premises described in the petition, and hear the proofs and allegations of the parties and reduce the testimony, if any is taken by them, to writing, and after the testimony is closed in each case, and without any unnecessary delay, and before proceeding to the examination of any other claim,” they are to ascertain and determine the compensation to be made for the land appraised by them. Thus by § 15, five persons may appraise all proposed to be taken in the county, and § 16 evidently contemplated a succession of appraisals by the same commissioners. I think one report may also embrace all the cases, and that any person interested and made a party, can appeal from such parts thereof as affect him.

It would be very burdensome if entire proceedings and a complete set of commissioners for every piece of land, or for every distinct interest were necessary. I think the court has jurisdiction, whatever number of parcels may be included, and perhaps has power to fill more than one commission, when good cause therefor is shown. But if so, that should not be done unless clearly necessary. Ordered accordingly.



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Kanouze Appellant agt. Martin Respondent.

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## COURT OF APPEALS.

KANOUSE Appellant agt. MARTIN Respondent.

Where the object of the appeal from the judgment was to review an *order* made by a judge at chambers, denying a motion of the appellant to remove the cause into the Circuit Court of the United States, and the record showed that no appeal had been taken from that order, to the court below; *held*, that the appeal could not be sustained.

*December*, 1851. This cause was submitted upon printed arguments and points at the last September term (1851) held at Syracuse.

Foot, Judge—delivered the opinion of the court.

The appellant attempts in this action to review by appeal to this court an order made at chambers by one of the judges of the Court of Common Pleas of the city and county of New York, on the fourth of October 1845, and entered in form on the sixth of that month, denying a motion of the appellant to remove the cause into the Circuit Court of the United States for the southern district of New York.

The record shows no appeal from the decision of the judge, at Chambers, to the Court of Common Pleas, nor any judgment of that court, affirming or reversing the decision of the judge, at chambers.

Final judgment was given in the Common Pleas in March 1846. The cause was carried by writ of error to the Supreme Court, and after issues were joined on a general and special assignment of errors, was, in February 1850, transferred to the Superior Court, and judgment of affirmance pronounced by that court in May 1850. From which judgment an appeal was taken to this court in October of that year

The following decisions of this court are decisive to show that this appeal can not be sustained: *Gracie vs. Freeland*, 1 *Comst. R.* 228; *Grover vs. Coon*, *id.* 536; *Tilley vs. Phillips*, *id.* 610; *Lake vs. Gibson*, 2 *id.* 188.

Appeal dismissed with costs.

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## SUPREME COURT.

## CORWIN agt. FREELAND AND OTHERS.

An *execution* must follow the judgment and be *warranted by it*.

An *order of arrest* before judgment, under § 179 of the Code, is in no case a justification, or evidence of a justification, for an arrest on *final execution*. (*This agrees with the decision in Gridley agt. McCumber*, 5 How. Pr. R. 414, and *overrules the decision in Cheney agt. Garbutt*, id. 467.)

Where the cause of arrest exists at the time of drawing the complaint, it should be stated in the complaint.

Where the plaintiff has failed to state the cause of arrest in his complaint, in an action on contract, and is afterwards prosecuted for an arrest on the execution (or false imprisonment), he must allege and prove the facts, which entitled him to make the arrest, and can not rely on a judge's order made before judgment.

A plaintiff may omit to arrest a defendant before judgment, but may afterwards arrest him on final process, provided it be a case where he might lawfully have arrested him before judgment, on a judge's order.

The *causes* of arrest enumerated in subdivisions 1, 2 and 4 (§ 179), must of necessity exist at the time of the action. The causes mentioned in the 3d subdivision may be ascertained sufficiently and inserted in the complaint. Those in subdivision 5, may exist at the commencement of the suit; but if they occur after action and complaint, the plaintiff has ample remedy under the law of 1831, to abolish imprisonment for debt (2 R. S. 3d ed. 107, § 4, 5, 6, 7, 8, 9).

*May General Term, 1851, MASON, MONSON and SHANKLAND, Justices.* This was an action for false imprisonment, brought by the plaintiff, a merchant of Ithaca, Tompkins co., against the defendants, who are merchants residing in the city of New York, and was tried at the Tompkins circuit in December 1850, without a jury, and a judgment rendered for the plaintiff, from which the defendants appealed to the general term. The answer stated that the present defendants commenced an action against the present plaintiff on the 8th day of April 1850, to recover the price of a bill of goods sold to defendant by them; that on the 9th of April an order for his arrest was obtained upon an affidavit alleging fraud by the present plaintiff in the purchase of said goods; that Corwin was arrested on said order; that the complaint contained no allegation of fraud in said purchase; that Corwin gave bail,

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judgment was obtained, and execution issued against his person (after an execution against his property was returned unsatisfied) and he arrested thereon, and imprisoned; and that this was the cause of action complained of; that no affidavit of fraud, nor order for Corwin's arrest, was annexed to the judgment roll in the cause, but after the arrest and imprisonment, on said execution, the plaintiffs in that suit obtained leave of the court to annex said order to the roll, and the same was done *nunc pro tunc*.

A. DANA, *for Appellants*.

S. B. CUSHING, *for Respondent*.

By the Court, SHANKLAND, Justice.—The question presented for adjudication, in this cause, is one of vast practical importance, and well deserves the consideration of this court.

It is no less a question than whether a citizen can be deprived of his *reputation* and *liberty*, without a trial. If the Code authorizes such a procedure the legislature should know it, and correct the evil. The defendants contend that sections 178, 179, 180, 181, 182, 183 and 288, have altered the practice fundamentally from the old system; and that it is no longer necessary that the execution *should follow the judgment, and be warranted by it*, but that the whole question of arrest and bail, and imprisonment on execution is to be settled by *affidavit on motion to the court*, irrespective of the allegations of the complaint; or in other words, that the plaintiff may declare on *promises simply*, without alleging that the money was *fraudulently misapplied by a public officer*, or that the defendant was *guilty of fraud* in contracting the debt sued for, and may then get an order for the defendant's arrest, on affidavit; and then if he finally succeeds in getting judgment on his complaint, he may issue execution against the defendant's person, on the strength of the judge's order; and that the only mode the defendant has, to meet the question of fraud, &c. is by motion to vacate the order of arrest, under sections 204 and 205.

A careful consideration of the subject has satisfied me that this is a superficial and erroneous doctrine, at war with the whole

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spirit of our laws, and of the Code itself, as the following considerations will tend to prove:

*First.* By the old system of practice, the pleadings and judgment, as contained in the record itself, governed and controlled the execution which issued thereon; and the codifiers have nowhere informed us that they intended to alter the rule.

*Second.* The causes for which arrests may be made, enumerated in section 179, and its subdivisions, *may* and most of them *must* exist prior to drawing the complaint; and in most of them, the very facts which authorize arrests, must of necessity be set forth in the complaint in order to constitute a good cause of action.

*Third.* The *gist* of the complaint, in the cases of arrest, is the fraud or wrong of the defendant, either perpetrated or attempted to be. This is the *feature* in the case, which gives the now extraordinary remedy of imprisonment.

*Fourth.* And it is in consequence of the plaintiff's asking for an arrest, that he is required to give an undertaking by section 182, conditioned, that if the defendant recovers judgment, the plaintiff will pay all costs, and all damages by reason of the arrest. Now the object of this is to indemnify the defendant against the costs of the suit, and damages of the arrest. But if the plaintiff may complain for a debt simply, and omit in his complaint an allegation that the debt was fraudulently contracted, he may of course *omit* proof on that subject, and obtain judgment on proof of indebtedness only, and thereby save the condition of his undertaking, however unjust and unfounded the order of arrest may have been; for we have seen that the plaintiff's bond is only, *that if the defendant recover judgment*, the plaintiff will pay costs, &c. The object of this section demonstrates that if the codifiers meant any thing in particular, it was that if the plaintiff failed to establish the allegation of fraud on the trial, he should fail in a recovery of judgment, and should pay the costs and damages for the unjust arrest.

*Fifth.* If no allegation of fraud, or other fact, upon which the right to imprisonment depends, is necessary in the complaint, the defendant has no opportunity of taking issue upon its truth; no



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opportunity of disproving it; no trial by jury; nor right of cross-examination of witnesses. Therefore, although fraud is a crime, involving moral turpitude; and as such is punished by imprisonment, not merely to enforce payment, but also as *punishment*, even if the defendant is unable to pay, yet the defendant's liberty and character are sacrificed, by the *ex parte* order of a judge at chambers, founded on the *ex parte* affidavit of the plaintiff; an order which it is contended reaches not only *to*, but *beyond* the judgment, and dictates the character of the ultimate process which must issue on that judgment. Wise legislators could not consistently be sedulous to secure the *reality of a trial* on the simple question of *indebtedness*, and *deny* even the *semblance* of one, on the far more important question of *fraud* which is involved in the same action, and on which are *periled* the *reputation* and *liberty* of the defendant.

*Sixth.* But the 288th section of the Code, is wholly inconsistent with the doctrine, that the *ca. sa.* is founded upon the order; because, if the record of judgment shows that the case is one for arrest within the 179 section, an execution against the person may issue of course.

"If the *action* be one in *which the defendant might have been arrested*, as provided in section 179 and section 181, an execution against the person of the judgment debtor may be issued," &c. The test is, not, *if an order for an arrest has been made before judgment*, but if the *action* be such an one, as the defendant *might have been arrested on*. But how shall it be made to appear that the action is such an one as the defendant might have been arrested on? I answer, only by reference to the pleadings and judgment. The order of arrest forms no part of that record, because it does not involve the merits and necessarily affect the judgment. It is a mere provisional and temporary order, and only covers the period between the date of it and the final judgment. Only such orders as may be reviewed by the appellate court after final judgment, can form a part of the record (§ 328, 281).

*Seventh.* Any other construction of the 288th section, would

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lead to the following absurdities: The plaintiff may omit allegations of fraud, in his complaint, and after he has obtained judgment, issue execution against the body, and try the question whether the action was within the 179th section by affidavit on a motion for the defendant's discharge, or in an action against him for false imprisonment; or else he *must obtain* an order of arrest before judgment, *in all cases*, or lose the remedy by personal execution, as seems to have been held in *Squire vs. Flynn* (2 *Code Rep.* 117). But it seems quite evident that the object of the Code was not to *oblige* the plaintiff to arrest the defendant in all, or any of the cases, before judgment, or forego the right to imprison him on execution. If he chooses to await the final result of a trial on his complaint, containing a proper development of the action, and showing it to be for one of the cases enumerated in section 179, he may do so without an order of arrest, without giving an undertaking, and without hazarding his ultimate remedy. This view of the subject corresponds with the language of the 288th section, above quoted, and makes the *right to arrest*, the *test*, and not the *exercise of that right*; and the form of the complaint and judgment, is the only legitimate evidence of the *right*, after judgment.

*Eighth.* The defendant's right to imprison the plaintiff for costs, depends upon the question of the plaintiff's right to have imprisoned him, in case the judgment had been for the plaintiff. Suppose the plaintiff's action is for damages for converting personal property, and the defendant has not been arrested before judgment on a judge's order; will it be contended that if the defendant succeeds, he can not issue a *ca. sa*? Or if an attorney is sued on the money counts only, for money which it is claimed he received as attorney and refused to pay over to his client, but the defendant succeeds; will the court authorize an execution against the person of the plaintiff for the costs? The rights of each party to an execution against the body of the other, are made reciprocal, by section 288; and the causes set forth in the complaint, should be the only test in every case.

*Ninth.* The subject of *arrest and bail*, are classed under the

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head of "Provisional Remedies," which *ex vi termini*, means "temporary" or, "measures taken for security," and in this connexion means a temporary arrest, so that if the final result shows the defendant to be guilty of the matters charged, he may be imprisoned. In this respect, it is similar to the temporary injunctions, issued for security, during the litigation; and as well might it be claimed that it had the force and perpetuity of a perpetual injunction, as that an order for a temporary arrest had the enduring force now claimed for it.

*Tenth.* The character of the questions heretofore tried on affidavits, and the well known practice on motions to vacate orders for arrest, forbid the presumption that the legislature would *force* on defendants that mode of trial, where so much was at stake. Only mere questions of practice in the orderly conduct of suits, including motions to get rid of temporary arrests, have been settled in this mode. And where the affidavit to hold to bail, or to arrest, is *positive*, the motion to vacate is denied; although the defendant positively denies the cause of arrest. This is still the practice, under our Code, as was held by Mr. Justice WILLARD, in *Martin vs. Vanderlip* (3 *Howard*, 265-9), and in other reported cases. Can it be supposed that the learned justice, in thus affirming and applying the rule to cases of arrest under the Code, would have thus done, if he had been of the opinion that his decision of such a motion, was to decide the ultimate right to imprison the defendant, on final process? I presume not. But if the appellant's position on this question is correct, then, as the justice in that case remarks, "a different practice would be attended with great inconvenience. It would lead to the *trial of every cause in which the defendant can be arrested upon the merits on affidavits*, and would be holding out great encouragements to defendants to commit perjury in relief of themselves from special bail." But if such would be the consequence of receiving conflicting affidavits, on the question of a temporary arrest, how much greater the war of affidavits, and the inconvenience, when it comes to be known, that not only a temporary, but an *interminable* imprisonment, is to be the consequence?

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*Eleventh.* If the only mode of vacating an order of arrest, which was to prove effectual after judgment, is that afforded by sections 204 and 205, it seems that the law would have allowed more time for the motion, and would have prescribed a different mode, by allowing the defendant the last affidavit, so as to explain any new matter set up by the plaintiff's affidavit. But the codifiers had no such consequences in view, as is now claimed by the appellants, and they accordingly adopted the old practice, substantially, on the subject of vacating orders of arrest and mitigating bail.

The main arguments urged in support of the appellant's views, were that some of the causes for arrest under section 179, might occur after the commencement of the action, and could not be included in the complaint; and also, that, as section 183 permits the order to be made at the commencement of the suit, or any time afterwards, before judgment, it is inferred that the order of arrest may be made for *causes* occurring at any time after the suit commenced. But it is answered, that all the causes of action sued on, must have occurred before suit brought, and the right to arrest must exist at the commencement of the suit or not at all. None of the causes of arrest are such as could not exist before suit brought; for instance take the strongest case put, under the 3d subdivision;

“ In an action to recover the *possession* of personal property, unjustly detained, where the property or any part thereof, has been concealed, removed or disposed of, so that it can not be found or taken by the sheriff.” The Code does not require an actual trial by the sheriff to find the property as a test of the fact of its being concealed, removed, or disposed of. The fact can be proved in any other manner; and the fact of its removal, &c. may be inserted in the complaint, and proved on the trial; or if the object be to get an order of arrest, it can be shown by affidavit; or, *perhaps*, if the plaintiff claims an immediate delivery of the property, under sections 206, 207 and 208, when he commences his suit, and the sheriff can not find it he may insert that fact in his complaint, which would be drawn up afterwards. If the defendant has shipped the property to foreign parts, as oc-



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curred in Van Neste agt. Conover (5Howard, 148), the fact may be ascertained, as well before action as afterwards, and be so alleged in the complaint. The causes of arrest enumerated in subdivisions one, two and four, must, of necessity, exist at the time of the action. The causes mentioned in the fifth subdivision may exist at the commencement of the suit. The offence there is, the *intent to defraud creditors generally*, by the removal or disposal of property, or being about to do so. This offence is committed where the defendant, in anticipation of actions, has removed it from the state, or is about to do so; or by selling it to a fraudulent purchaser, as a cover. If the plaintiff can prove the fact, he may allege it in his complaint, hold the defendant to bail, and have execution against his person. If the offence occurs, after action and complaint, the plaintiff has ample remedy under the law of 1831, to abolish imprisonment for debt (2 R. S. 3d ed. 107, § 4, 5, 6, 7, 8, 9). In proceedings under that act, the defendant has the advantage of a full trial on oral testimony.

Subdivisions 4 and 5, are not found in the old Code, and in the new, were borrowed from the act to abolish imprisonment for debt.

In the old Code, the words, "in an action," &c. is used in every case, in § 154; but in the additional cases in the new Code (§ 179, subs. 4 and 5), the language is changed to "where the defendant," &c. In both codes, the language of the section is the same, and refers back to the *actions* in which arrests may be made. Now, did not the codifiers mean to confine the execution against the person, to the three first subdivisions of the 179th section, the same as in the old Code? At all events, it is a legitimate inference, that if, by the old Code, the causes of arrest must have existed at the commencement of the suit, and must have been developed in the complaint, in order to warrant execution against the person, then the new Code did not intend to change the practice in so important a particular, by the additional causes of arrest contained in the new Code.

Finally, whatever doubts may exist on this question, of one thing there can not be a doubt, that the practice contended for

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by the appellant, is at war with all former experience in this country and in England; is exceedingly dangerous in its tendencies, would lead to cases of great hardship and oppression on defendants, and would result in the trial of most important interests, involving character and liberty, by the most unsatisfactory mode of eliciting truth.

Whereas, the other mode of practice is analogical, and preserves the rights of all parties. The plaintiff sets forth in his complaint the cause, or causes, which entitle him to arrest the defendant, and to the execution against his person. If he desires to have the defendant arrested at any time before judgment, he can do so, by making the required proof, or if he chooses not to do so, he can safely omit it, without the loss of his remedy by final process, because, within the language of section 288, *he might have arrested him*. The defendant's rights are also protected. He is informed by the complaint, of the peril he is in. He can meet the charge by his answer, and by evidence on the trial; and if the plaintiff has given the undertaking required on arrest, the defendant has the benefit of the condition of that instrument, if judgment is rendered in his favor. He gets the costs of the action if the plaintiff fails to substantiate the charge of fraud in contracting the debt, or whatever the case may be; and, finally, he has a right to imprison the plaintiff for the costs, if the record shows the case to be one of those where *he* could have been imprisoned, if the plaintiff had succeeded.

If the plaintiff makes a charge of fraud against the defendant, for the sake of the remedy, he should be beat, if it is untrue; and the practice should not be sanctioned, which would allow him to declare for a *simple debt*, and then arrest, for a *pretended fraud*, and if the defendant gets discharged from the arrest, on motion, then take judgment for his debt, and escape costs, and all responsibility on his undertaking, as he could do, by that mode of practice.

The practice of the English courts, under the 1 and 2 Vict. c. 110, ought not, and can not be adopted here, because *there*, imprisonment on final process, issued on judgments, *exists in all*

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*cases*; and the provisional arrangements made by that statute, for arrest and bail, on mesne process, can at most work a temporary injury; because, whether the defendant be arrested or not, on mesne process, he is liable to be so, on the final execution. And although our codifiers have, on the subject of the commencement of suits, and arrest and bail, taken the English statute as a pattern in some important particulars, it must be remembered that the effect of an arrest by a judge's order and *capias*, under the English act, extends *not after judgment*.

The right there to imprison, after judgment, is by virtue of the general law of the land, and extends to all judgments; whereas, here, the rule is the other way, and the right to imprison is limited to a few specified cases. Hence, if the right to imprison on final execution, here, is co-extensive with the cases of actual arrest on a judge's order, and there is no way to get rid of such arrest, or to try the fact of fraud, &c. except by *affidavit* before the judge, it gives to the order the effect of a final judgment on the question of imprisonment. If the words of our Code, can bear this construction, it clearly could not have been the intention of the legislature, and this court should by judicial construction, restrain the operation of the statute within proper limits.

By the English statute above mentioned, all actions are commenced by writ of summons only, and no arrest of the defendant can be made on it; but if the plaintiff at any time before final judgment, proves to a judge by affidavit, that he has a cause of action against the defendant for twenty pounds, or upwards, and that there is probable cause to believe that the defendant is about to quit England unless he is forthwith apprehended, the judge may order the defendant to be held to bail, for such sum as the judge shall see fit; and thereupon the plaintiff may, within the time expressed in the order, sue out one or more writs of *capias*, for the defendant's arrest.

Our Code adopts the summons as the mode of commencing the suit, and the judge's order for arrest, but dispenses with the *capias*, it likewise allows the order of arrest to be made at any

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time before final judgment: But in England, the only cause of arrest is that the defendant is about to quit England, and the debt is over twenty pounds. I have already shown that this order of arrest in England does not in any manner affect or control the character of the execution which is to issue.

But if the judge's order of arrest is to operate beyond the judgment, under our act, then there must be some common law mode of trial of the truth of the allegation on which it is claimed the defendant can be arrested; and this may be as well by action of false imprisonment, wherein the defendant must set up in his answer the facts on which he claims the plaintiff was lawfully arrested on the execution in the former suit. By the 288th section, the plaintiff is limited in his right to arrest, to such cases only as the defendant *might have been arrested* in, by § 279 and 281.

The Code does not say, nor mean to say, that the order of arrest, made before judgment, shall be the test, or any evidence of the right to arrest on the execution, and the right and liberty of defendants forbids any such construction in favor of arrests. At least give the Code such a construction as will allow the defendant who has been imprisoned on execution, the opportunity of trying the truth of the charges in some mode besides on affidavit and motion. That mode of trial will do where the arrest is temporary, and for the purpose of bail to the action, and should be confined to that. In the Code reported to the legislature in 1850, the codifiers, in § 834, retain the language of the 288th section of the present Code, so far as the first three subdivisions of the 179th section is involved, but change it as to the 4th and 5th, by saying that "an execution against the person may likewise be issued after such return, in the cases mentioned in the 4th and 5th subdivisions, *where the defendant has been provisionally arrested in the action, and the order for his arrest has not been vacated*, or upon an order of arrest obtained in the same manner as for a provisional arrest." This change in the phraseology of the section, shows that the codifiers intended, in the present Code, that the cause of arrest should appear in the complaint,



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Corwin agt. Freeland and others.

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when it was within the first three subdivisions, or that the question of the truth of those causes of arrest, must depend upon the result of a trial for false imprisonment. The change in the last clause proves also that they did not intend that the fact of arrest and bail before judgment, should be evidence on which to issue the execution after judgment, in the first three subdivisions of the proposed Code, or in any of the subdivisions of the present Code. The words, "*might have been arrested,*" can not be, and ought not to be construed to mean, "*shall have been arrested,*" when the effect of such construction will be to *construe* a defendant out of his liberty or a trial of the question, whether "*he might have been arrested*" *rightfully*.

An additional reason why the order of arrest, made before judgment, should not have any bearing on the nature of the final process, may be found in the fact that the proceedings for arrest and bail, are altogether *collateral to the summons and other proceedings in the suit*; and the latter are not in any manner dependent upon the former: It has been so decided by the English courts in proceedings for arrest and bail, under 1 and 2 Vict. chap. 110, § 3 (*Vizetelly vs. Wickof*, 9 *Jur.* 453 *in Exch.*).

Now, as the said proceedings for arrest and bail, are not a proceeding in the suit, but collateral thereto, how can the order of arrest be allowed to affect the final judgment, or process to issue thereon?

But if the order of arrest is a part of the final judgment, and warrants the issuing of a *ca. sa.* then I hold it should have been attached to the final judgment and made a part thereof, as directed by subdivision two of section 281; and until it was so done, the execution issued in this case was not warranted by the record, and affords no justification to the defendants. The filing it, *nunc pro tunc*, under a judge's order after the defendant had been arrested and discharged, could not cure the evil.

I am, therefore, of opinion, 1st, that where the cause of arrest exists at the time of drawing the complaint, that cause should be stated therein.

2. That the order of arrest before judgment, is in no case a

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justification, nor evidence of a justification, for an arrest on *final execution*.

3. That where the plaintiff has failed to state the cause for arrest, in his complaint, in an action on contract, and is afterwards prosecuted for an arrest on the execution, he must allege and prove the facts which entitled him to make the arrest, and can not rely on a judge's order made before judgment.

4. That the plaintiff may omit to arrest a defendant before judgment, but may then arrest him on final process, provided it be a case where he might lawfully have arrested him, before judgment, on a judge's order.

5. That the defendants' answer does not set up a good defence in this action, because it *admits* no allegation of fraud was inserted in their complaint in the former cause, and it does not allege or pretend, that the debt on which said suit was brought, was in fact fraudulently contracted.

6. But if it shall be held that the order of arrest is part of the judgment, and justifies the execution, then I hold it was not so in this case, because not annexed to the judgment.

The execution being void, it was unnecessary to have it set aside in order to sustain this action (1 *Cow. R.* 734-5; 3 *J. R.* 523; 5 *Hill R.* 244)

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## SUPREME COURT.

FOSTER Respondent agt. CLEVELAND AND OTHERS Appellants.

FINCH Respondent agt. SAME.

A public officer, sued for an official act, can not get double costs on an *appeal* by him.

A. was sued in a justice's court for acts done by him as an officer of a school district, and had judgment, which was reversed in the County Court. A. appealed to the Supreme Court, where the judgment of the County Court was reversed. *Held*, he could not have double costs on the appeal.

*St. Lawrence Special Term, Feb. 1851. Motion for double costs.* These suits were commenced by the respondents against Cleveland, as collector, and the other defendants as trustees of a school district, for acts done officially, before a justice of the

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peace, who rendered judgment for the defendants for costs. The plaintiff appealed, and the County Court reversed the judgment, and then the defendants appealed and the Supreme Court reversed that of the County Court, and affirmed that of the justice. The defendants now move for double costs on the appeal.

D. S. IDE, *for the Motion.*

W. H. WALLACE, *Contra.*

HAND, Justice.—There is some diversity of opinion as to the right of a defendant, sued for official acts, to double costs (*Hal-lenback vs. Parker*, 4 *Howard*, 239; *Murray vs. Hopkins*, *id.* 263; *Chadwick vs. Brother*, *id.* 283). In one or two cases, I came to the conclusion that this law for the protection of public officers, was still in force (*Barber agt. Crossett*, *ante p.* 45). That it was a distinct provision, which was not repealed by implication, but was one of those existing statutory provisions relating to actions, which is not inconsistent with the Code, and therefore not affected thereby (*Code*, § 471; and see *Cheney vs. Windsor*, 5 *Denio*, 96).

But this statute has been held not to extend to a plaintiff in error (*Dockstader v. Samons*, 4 *Hill*, 546). The defendants now remain "defendants" during the whole progress of the cause, whether appellants or respondents. But as they appealed in the case under consideration, I think they are within the spirit of the decision in *Dockstader vs. Samons*. Defendants in error were entitled to increased costs (*Burkle vs. Luce*, 1 *Comst.* 239). And this, perhaps, would now be so, with a respondent; for the statute gives them, if judgment be rendered for the defendant upon verdict, demurrer, nonsuit, non pros., discontinuance of the plaintiff, or *otherwise*, in any action, certiorari, writ of error, or other proceeding, &c. (2 *Rev. Stat.* 617, § 24. And see *Revisors' Notes*, 3. *Rev. Stat.* 798, 2d ed.). But the object of the statute was to prevent vexatious suits against persons for the performance of official duties, or for acts done by authority of any statute of this state. And where an inferior court has decided that the action was well founded, I do not think costs should be allowed to the successful appellant, when they would not have been to

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the same party as plaintiff in error. I am aware that Mr. Justice COWEN put *Dockstader v. Samons* upon the word "defendant" in the statute. Were that a sufficient reason, it would not follow that the legislature intended to change the rule as to costs, merely by this change in the practice. But I think the decision stands upon higher ground; that which I have already noticed.

Motions denied.

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## SUPREME COURT.

ANIBAL agt. HUNTER.

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In slander, an answer justifying the speaking of the words, must confess the speaking thereof.

An answer merely stating that the words spoken are true, is insufficient as a justification: it should state the facts which go to constitute the crime imputed, so that an issue, either of law or fact may be framed.

Where the ground of demurrer to an answer is that "it does not state facts sufficient to constitute a defence" it is sufficient merely to state that fact as the ground thereof, without pointing out wherein it is insufficient in other respects.

[*This case agrees with Sayles vs. Wooden*, ante page 84, and *Pike vs. Van Wormer*, ante 99, and s. c. 5 *Howard*, Pr. R. 171.]

*Saratoga Special Term, January 1851.* The complaint is in slander, and contains four counts. The first count is for words charging the plaintiff with larceny. "He stole a watch, &c." The second count is for a similar charge, with some variations. The third count is for committing perjury in giving evidence in the Montgomery Sessions on the trial of an indictment against one Robinson, setting out the words. The fourth count is for swearing to a lie and perjuring himself in an answer to a complaint in an action in this court in which Isaac Van Valkenburgh and Isaac Lefever were plaintiffs, and the (now) plaintiff was defendant; which answer it is averred was put in upon oath duly taken.

The defendant, 1st, denies speaking of any of the words charged in the complaint. This is the old general issue and extends to the whole complaint:

The second defence in the answer (or separate statement) denies each and every allegation contained in the complaint, except



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as therein stated and admitted. It then proceeds to state that in April 1850, Isaac Lefever and Isaac Van Valkenburgh commenced a suit in the Supreme Court against the now plaintiff by summons and complaint, for goods, wares and merchandize, money lent and advanced by the plaintiffs in that suit to the defendant therein at his request in the years 1847, 1848 and 1849, to the amount of \$ 188.68. That on the 29th April 1850, the now plaintiff put in an answer to that complaint which he duly swore to before a justice (setting out the jurat), in which answer, among other things, he swore that no part of the action mentioned in the plaintiff's complaint accrued or was incurred since the first day of December 1849; that previous to and until the 29th day of December 1849, he was an infant, under the age of twenty-one years, and that all the causes of action mentioned in the complaint accrued while the defendant was an infant as aforesaid; and further answering, the defendant in that suit said, that in June 1848, he paid the plaintiffs \$19 in money; whereas in truth and in fact, the said plaintiff (defendant in that suit) was not an infant under the age of twenty one years previous to and until the 29th December 1849, and the said causes of action did not accrue while the said plaintiff was an infant; and whereas the said plaintiff (defendant in that suit) did not about the month of June 1848, or at any other time pay the plaintiffs in that suit \$ 19 in money; that the defendant in that suit, when he so deposed and swore to the truth of said answer, then and there knew it to be false.

The answer then alleges that the complaint of Van Valkenburg et al. was duly verified, and that the matters in the answer of the defendant in that cause were material, and the defendant in that cause thus committed wilful and corrupt perjury in his said answer.

The *third* defence in the answer is, that the words charged to have been spoken in the fourth count of the complaint are true.

The *fourth* defence in the answer is that the plaintiff's general character is bad.

The plaintiff has demurred to the second item of the answer,

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called in the demurrer the third item, but sufficiently described by the folios to be identified, alleging that it does not state facts enough to constitute a defence.

The plaintiff has demurred also to the third answer, that it does not state facts sufficient to constitute a defence.

There is also a demurrer, which is said to cover an allegation in the answer between folios 10 and 11, for the same reason; but in my analysis of the pleading, I have placed that allegation as a part of the second answer; as a distinct answer it is no defence, but probably was intended as a part of the second defence stated in the answer.

A. H. AYRES, *for the Plaintiff.*

W. GLEASON, *for the Defendant.*

WILLARD, Justice.—The defendant insists that the demurrer should be disregarded because it does not state specifically the grounds on which it is founded. It merely says that the answer to which it is interposed, “does not state facts sufficient to constitute a defence.” If we compare the 144th section of the Code with the 153d, it will be obvious that nothing more need be stated in the demurrer for insufficiency than is set up in the present demurrer. This objection is not well taken. (*Durkee vs. S. and W. Rail Road Co.*, 4 *How. Pr. R.* 226; 3 *do.* 281; 5 *do.* 112.)

The second defence set up in the answer to which the demurrer is interposed, is bad, because it does not confess the speaking of the words intended to be justified (1 *Chit. Pl.* 511; 1 *Starkie on Slander*, *Wendell's ed.* p. 421, *et seq.*; *Stiles vs. Stokes*, 7 *East*, 493; 11 *J. R.* 38). The form of a plea of justification (2 *Chitty Pl.* 504), shows how the admission should be made. In the introductory part of the second answer the defendant denies each allegation of the complaint except as therein stated and admitted. The answer then sets up facts enough to show that the plaintiff was guilty of perjury, but does not admit that the defendant ever made the charge. This part of the answer should have concluded thus: “Whereupon the said defendant afterwards, to wit, on &c.

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at the several times in the fourth count of the said complaint stated, did speak and publish the said words of and concerning the said plaintiff in that count mentioned, as he lawfully might for the cause aforesaid;" or that he spoke certain of the words mentioned in the count, specifying them, or such of them as are intended to be justified. The answer, without some such admission, is insufficient and obnoxious to a demurrer.

The third defence stated in the answer is still more insufficient. It merely says that the words set out as slanderous in the fourth count of the complaint are true.

I am aware that the schedule of forms annexed to the first report of the commissioners on practice and pleadings, page 269, gives countenance to such an answer as the present. Those forms were never adopted by the legislature; and the one for a justification in libel or slander is utterly inconsistent with the Code. The Code requires that an answer shall contain in respect to each allegation of the complaint controverted by the defendant, a general or specific denial thereof, or a denial thereof according to his information and belief, or of any knowledge thereof sufficient to form a belief; *or a statement of any new matter constituting a defence*, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended. In this case the defendant does not deny the speaking the words but says they are true. In other words, he charges the plaintiff with the crime of perjury. His answer should contain a statement of the facts which constitute that crime. The plaintiff is well entitled to reply, controverting those facts, and thus have an issue framed which can be tried. The answer as drawn, states no facts, nor times, nor circumstances when and where the alleged perjury was committed. In "Anonymous" (3 *How. Pr. R.* 406), an answer like this, under the Code of 1848 was overruled as bad. That case arose at the Washington circuit. The same question has repeatedly been decided in the same way.

It has been urged that the proper remedy for the plaintiff was to move that the redundant matter of the answer be stricken out.

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Perhaps with regard to the second defence that remedy might have been pursued. The effect would have been to leave on the record nothing but the general denial of the speaking of the words. The plaintiff was at liberty under the amended Code to demur, as he has done.

As the practice is new, I will allow the defendant to amend on payment of twenty-one dollars costs.

There must be judgment for the plaintiff on demurrer to the second and third defence, with leave for the defendant to amend his answer within twenty days after notice of the judgment, on the payment of twenty-one dollars costs.

The other demurrer is overruled without costs. The plaintiff is excused from costs of that demurrer, for the reason that the form of the answer made it doubtful whether the part objected to was a separate defence or a part of the second defence. The defendant should not be paid for misleading the plaintiff's attorney.

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## SUPREME COURT.

FULLERTON agt. TAYLOR AND OTHERS.

The first paragraph of § 274 of the Code, is qualified and restrained by the next clause of that section, to the entry of judgment for or against one or more of several defendants, "*whenever a several judgment may be proper.*"

The Code has not declared when such a judgment is proper. It is therefore to be settled by the former practice.

In an action against several defendants upon a *joint* contract—not joint and several, a several judgment can not be rendered for or against one of them only, where no personal defence or disability to contract exists on the part of such defendant.

*Oswego Special Term*, 1851. The plaintiff brought his action against three persons upon a joint contract for work, &c. The allegations of the complaint were denied by the answer. The referee to whom the cause was referred reported that the defendants were not indebted to the plaintiff; that the work was not done in pursuance of any contract made with the defendants, but



that the contract was made with and the work done for Elgin A. Taylor, one of the defendants, who was indebted to the plaintiff to a certain amount therefor. Upon this report the plaintiff entered judgment against Elgin A. Taylor for the amount reported due with costs. A motion is now made to set aside this judgment.

J. C. CHURCHILL, *for Defendants.*

S. BURTON, *for Plaintiff.*

W. F. ALLEN, Justice.—It is supposed by the counsel for the plaintiff, that the proceedings and judgment in this action are authorized by the first paragraph of § 274 of the code of procedure. The language of that clause is quite general, but it is evidently qualified and restrained in its operation by the next clause of the same section, by which the authority to enter judgment, for or against one or more of several defendants is confined to those cases “*in which a several judgment may be proper.*” This qualification and limitation was deliberately added as an amendment to the section as originally reported and adopted, and could have been designed for no purpose other than to restrain and qualify the general terms of the original section, and to declare by a very clear intimation that there were cases in which a judgment for or against one or more of several defendants, was not proper. The section so far as it bears upon this question should be construed and read as if the two first paragraphs were incorporated into one; that is as authorizing a judgment for or against one or more of several defendants, “*whenever a several judgment may be proper.*” The Code has not declared when such a judgment is proper, and we are therefore referred to the former well established practice to decide that question. The cases in which such judgment was proper are familiar to the profession. They embraced actions of tort and actions upon contract in which one or more of several defendants established a personal defence as infancy, bankruptcy or the like; also actions against the several parties to a promissory note or bill of exchange, brought under the act of 1832. Perhaps, also, this class of cases might, under the Code, be held to include actions upon any contract, joint and

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several by its terms, and which the plaintiff might have treated as joint or several, and brought his action against one or all of the contracting parties, at his election.

I can not think that in an action upon a contract joint and not joint and several, and where no personal defence or disability to contract exists on the part of one or more of the defendants, a several judgment may be given against one only of several defendants, the plaintiff failing to establish a joint contract as alleged in his complaint.

A different construction would to some extent conflict with section 171 of the Code, providing for a failure to prove an allegation of the cause of action in its entire scope and meaning. The court might under § 173 allow the name of a party to be stricken out, and in a proper case would do so; but it would be upon such terms as would abundantly and certainly protect the rights of the defendants. If the amendment was allowed after issue it might be proper to permit a new answer to be interposed, if after trial a new trial might be necessary (Russell agt. Spear, 5 How. 142).

To allow the practice adopted in this case might seriously endanger the rights of defendants. If any one of half a dozen plaintiffs upon proving a several cause of action against any one of a like number of defendants of the same general character as that alleged as a joint cause of action against all the defendants, it might be impossible to know in advance of the trial, with any certainty, what cause of action would be tried. Indeed, in such a case, upon the construction claimed I see no reason why one of such plaintiffs might not recover against one of the defendants upon a joint cause of action existing against him and a third person, not a party to the suit; for it would never occur to him to set up in such joint action the nonjoinder of such third person as a party defendant and if the defect of parties is not alleged either by demurrer or answer, it is waived (*Code*, §144, 147, 148).

It is true he might avoid a judgment at some expense and trouble by proving to the satisfaction of the court that he had been misled (*Code*, § 169).

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If a practice of this kind is to be tolerated, all the witnesses for the defence may be effectually excluded by being made parties, and with slight evidence to charge them they must remain parties to the record until the whole cause as to all the defendants has been submitted to and passed upon by the jury. While parties they can not be improved as witnesses except to a limited extent (Selkirk agt. Waters, 5 *How.* 296; Munson agt. Hagerman, *id.* 223), and after verdict it is too late to use them. Again, one defendant may have a set off against any several demand of the plaintiff against him; but in a joint action against him and others, he can not plead it or give it in evidence (2 *R. S.* 354, § 18; and thus under the liberal practice supposed to have been provided by the Code, substantial rights may be lost.

I am not aware of any serious evils resulting from the former practice and rules of procedure in cases like the present which called for so radical a change of the law, or now requires from the courts the construction urged, unless it is clearly called for by the words of the statute. Plaintiffs must generally, if not in all cases, be able with reasonable diligence to decide in whom the legal right of action exists, and if not, the Code provides for amendments upon application to the court, to meet the difficulty. So in case of defendants, if too few are joined and the objection is not taken it is waived; if taken it may be obviated by an amendment. If too many are joined as defendants a like power of amendment is vested in the court. But the proceedings must be amended by the court. The defect can not be disregarded at the trial. The court or referee can only try the issues joined between the parties to the record. The point has not, to my knowledge, been directly decided; but the following decisions bear more or less directly upon it: Merrifield agt. Cooley, 4 *How.* 272; Russell vs. Spear and Selkirk vs. Waters, cited above; La Farge vs. Chelson, 3 *Sandf.* 752.

The counsel for the plaintiff relied somewhat upon the note of the commissioners upon pleadings and practice to the section as originally reported by them. It is a sufficient answer to say that although the legislature adopted the section originally as reported

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In the matter of Dennis Moss.

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(*Code of 1848*, § 230) the very next legislature modified it in the very essential particulars before suggested, and in so doing refused to sanction the change which it would seem the commissioners recommended.

Again, the circumstances under which the first Code was enacted, is matter of history and it may perhaps be said with justice to the legislature, and without disrespect to the commissioners, that in enacting the Code the legislature did not necessarily enter into all the views or adopt the reasons or constructions of its framers, and that very little reliable aid can be had in construing doubtful provisions by a resort to their report.

The report of the referee is, I think, substantially for the defendants, and that the last part of it may be disregarded as surplussage, the fact reported not being within the issue referred to him.

The motion must be granted with \$ 10 costs as part of the costs of the action.

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### SUPREME COURT.

In the matter of the application of DENNIS MOSS for taxation of Costs.

A person liable to pay costs on a foreclosure under the statute, on whose requisition the costs are taxed, is entitled to *notice* of such taxation.

Such a requisition may be made by a person entitled to the surplus out of which fund the costs are to be paid.

*Albany Special Term, November 1851.* Two mortgages were executed by Thomas Moss, now deceased, to Andrew D. Lansing, by whom they were assigned to Stephen H. Alden. These mortgages were foreclosed by Alden, by advertisement under the statute. The mortgaged premises sold for more than enough to pay the mortgaged debt and costs. Such surplus was claimed by the administrator of Thomas Moss, and also by Dennis Moss, the party moving, as heir at law, and an action of interpleader was brought by Alden to determine who was entitled to such surplus.



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In the matter of Dennis Moss.

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Dennis Moss served on Alden a requisition in writing that the costs be taxed by a proper officer. Alden proceeded to get the costs taxed, but not on notice to Dennis Moss or his attorney; whereupon Dennis Moss makes this motion for a retaxation of such costs and that such retaxation be made on due notice to him.

C. L. AUSTIN, *for Moss.*

J. J. HILL, *for Alden.*

PARKER, Justice.—The statute provides that the costs and expenses of foreclosing any mortgage by advertisement, shall be taxed by some officer authorized to tax costs in the Supreme Court, upon the requisition of any party liable to pay the same, and upon such party paying the expense thereof (2 R. S. 652).

I think Dennis Moss is in a situation to require such taxation. He claims the surplus as one of the heirs at law of Thomas Moss, the mortgagor, and he has been recognized as such claimant by being made a defendant in the action of interpleader. In as much as the costs are to be paid out of his money, he is, within a reasonable construction of the statute a party liable to pay them.

The statute clearly contemplates a taxation where the party can be heard, and not an *ex parte* taxation. It is certainly proper and fair that the party requiring the taxation, should have an opportunity of contesting it. Notice of the taxation ought therefore to have been given to him.

There must be a retaxation before a proper officer, on four days' notice, served on Dennis Moss or on Chas. L. Austin, Esq. as his attorney.

Neither party is to have costs of this motion.

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Mitchell agt. Westervelt.

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## SUPREME COURT.

MITCHELL agt. WESTERVELT.

## COSTS.

Allowed, seven dollars for services after notice of trial and before trial, where a verdict was set aside on payment of the costs of the circuit.

Allowed, fees for the travel of a witness whose family resided in Montgomery county, but whose place of business was in New York, and who came from New York to attend a circuit in Montgomery county, and immediately returned.

Where, on motion, costs are directed to be paid unconditionally, process in the nature of a fi. fa. to collect the same may be issued, if not paid within twenty days, without demand or application to the court.

Where the court can not fix the amount of interlocutory costs to be paid by a party, the clerk may be directed to tax or adjust such costs. And the party in that case, unless otherwise specified in the order, has fifteen days in which to pay them. *Quere*, if to be paid within a certain time as a condition of relief.

*It seems*, that in such case, after the amount is ascertained, collection thereof may be enforced by process in the nature of a fi. fa. without further application to the court therefor, if expressly authorized in the original order. *Quere*, if granted conditionally.

But the mere costs of making or opposing motion, should be fixed by the court. *Quere*, whether the clerk can now tax interlocutory costs.

*Schenectady Special Term, November 1851.* Motion to set aside an execution and two processes in the nature of a fi. fa. and also for retaxation of costs.

This cause was tried and verdict taken for plaintiff at the Montgomery June circuit, 1851, defendant not appearing, and costs were adjusted on notice to defendant's attorney at \$58.22, and judgment entered on the 20th day of June. An order to stay proceedings was obtained by defendant on the 18th of June, served by depositing in post office, &c. on the 20th. Notice of motion to set aside the judgment was given for the July special term at Schenectady, but defendant not making it, the court ordered the defendant to pay the "plaintiff \$10 costs for appearing to oppose said motion." On the 5th of August, on motion of defendant, an order was granted setting aside the judgment, on paying the "plaintiff within twenty days, his costs of the cir

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cuit" and \$10 for appearing to oppose the motion at Schenectady, and \$10 costs of that motion, and in case the defendant did not comply with those terms, the motion "was denied with \$10 costs." On the 11th of October the plaintiff, on notice, had his costs of circuit taxed or adjusted by the clerk at \$42.75, the defendant's attorney making objections to some of the items by affidavit and a letter sent to the clerk. The clerk allowed this item "after notice and before trial, \$7," and for travel of a witness from New York. It appeared that New York was his place of business; that he came to Montgomery county to attend the circuit, and immediately returned; and that he was a material witness in the cause. His family resided in Montgomery county. On the 13th of October, a notice of the amount of these costs of circuit was served by mail on defendant's attorney. On the 18th of October, the costs not being paid, the plaintiff issued an execution on the judgment, and two precepts to collect \$10 each.

W. D. WHITE, *for the Motion.*

S. S. ELY, *Contra.*

HAND, Justice.—The plaintiff was entitled to the charge of \$7. This was intended as a compensation of a notice of trial, issuing subpœnas, &c., preparatory to trial, and is part of the costs of circuit (*Code*, § 307). Fifteen dollars is the allowance for trying the cause, and not for the preparation (5 *How. Pr. R.* 336; 4 *id.* 304). The same pleadings, perhaps, may be used on a second trial, but that does not alter the case. Nor do the provisions of the *Code*, giving costs where a cause is not reached, or is postponed, apply, when there has been a trial (*Code*, § 307, 314).

Travel of the witness was also properly allowed. Probably, his permanent residence was in Montgomery county, but his place of business, and from which he actually travelled to attend as a witness in this cause, and to which he immediately returned, was New York. This case can not be distinguished from that of *Clark vs. Staring* (4 *How. Pr. R.* 243). Where Mr. Justice GRIDLEY allowed the charge.

The precepts to collect ten dollars each, were regular. These

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sums were to be paid at all events, and more than twenty days had elapsed, even after the expiration of the twenty days in which the costs of the circuit were to be paid.

The remarks of Mr. Justice PARKER, in *Morrison vs. Ide* (4 *How. Pr. R.* 304), are not opposed to this view. One precept there, was issued in the wrong court, and the other for costs not taxed. Formerly, there must have been a personal demand and a motion to the court (2 *R. S.* 535, § 4; 9 *Paige*, 609; 1 *Burr. Pr.* 339). But this was changed by statute (*Laws of 1840*, p. 333, § 15).

That act requires orders, awarding costs on granting or denying special motions, to specify the amount of such costs, "and where the order for the payment of costs, or of any sum of money, upon a special motion, is not conditional, a precept to enforce payment of such costs or sum of money, may be issued without any demand or application to the court." That precept was an attachment until the statute of 1847 (*chapter 390, page 491*), which prohibited, with certain exceptions, an attachment against the body for interlocutory costs; and provided that "process, in the nature of a *fieri facias* against personal property, may be issued for the collection of such costs, founded on such order of court." This was only a substitution of process against the goods, for that against the body, and did not change the practice in obtaining it. The Code has not made any alteration in this respect (*Code*, §. 178, 468, 469, 471. And see *Buzard vs. Gross*, 4 *How. Pr. R.* 23; 5 *id.* 376). Payment of these two sums of ten dollars each was a part of the conditions of relief, and by default as to them, the defendant lost the benefit of the rule. It follows, that whatever may be the mode of ascertaining the costs of a circuit, the plaintiff was regular in issuing execution. But as there seems to have been a misapprehension of the practice, defendant may still be relieved on terms.

If the defendant had paid the \$20, according to *Headley vs. Cuyler* (10 *Wend.* 593), he was not entitled to twenty days after taxation of the costs of circuit. The rule adopted in that case was very rigid. And in ordinary cases, a party has fifteen days



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Mitchell agt. Westervelt.

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after taxation to pay the amount (*Rule*, 38; *Post vs. Haight*, 2 *How. Pr. R.* 175; *Old Rule* 60). In this case, both parties seem to have acquiesced in the power of the clerk to tax. If that were not so, the practice in such cases might be a little doubtful. The Code does not say the clerk shall not tax, or "adjust," as it is now denominated, except on final judgment; nor does it establish a complete system in all respects. But the amendment to the judiciary act (*Laws of 1847*, p. 645 § 38), prohibits the county clerk taxing costs, except where they shall be limited by law, exclusive of disbursements. And it has been said the clerk has now no power to tax costs (*PARKER, J.*, in *Morrison vs. Ide*, *supra*, and in *Eckerson vs. Spoor*, 4 *How. Pr. R.* 361). Many of the profession, however, have treated the clerk as a taxing officer, and rule 38 recognizes taxation of interlocutory costs. No doubt the better way is, to fix the amount of the costs, where that can be done; and it would be proper to direct that process issue to enforce payment, which, in that case, could issue of course, after twenty days (*Post vs. Haight*, *supra*). And, if the sum can not be ascertained conveniently by the court, I have no doubt that it can be referred to the clerk to ascertain or adjust the amount; and I see no reason why the order may not further authorize process to collect the amount so ascertained (*People v. Nevins*, 1 *Hill*, 154). This, perhaps, would not be regular, where the costs to be ascertained, were granted conditionally (*Laws of 1840*, p. 333, § 15).

The defendant has made two motions when relief could have been obtained by one. He must, therefore, pay \$10 costs of opposing these motions. And upon paying that and the costs of circuit, and of the two former motions and of the sheriff on the execution and the two precepts, the verdict, judgment, and execution and precepts, must be set aside.

Ordered accordingly.

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Getty agt. The Hudson River Rail Road Co.

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## SUPREME COURT.

GETTY agt. THE HUDSON RIVER RAIL ROAD COMPANY.

Claims for both legal and equitable relief may be united in one action, where they are not inconsistent with each other.

Cases in which amendments ought to be allowed at the circuit.

*Albany Special Term, November 1851.* This was a motion to set aside an amended complaint. The facts sufficiently appear in the opinion of the court.

MR. MONELL, *for Defendant.*

MR. GENET, *for Plaintiff.*

PARKER, Justice.—The defendant seeks to set aside the amended complaint on the ground that it is for a cause of action different from that set forth in the original complaint, and therefore irregular.

The original complaint alleged the construction of a railroad across a bay between plaintiff's farm and the Hudson River, and claimed damages for thus obstructing the navigation between the farm and the river. The amended complaint not only claims such damages for the injury already suffered by such obstruction, but also seeks indemnity for the future, by praying that the defendants be adjudged and enjoined to construct such a bridge as is required by the fifteenth section of their charter, so as to admit of the passage of plaintiff's boats and vessels between his farm and the river.

The original complaint claimed only legal relief. The amended complaint claims relief both legal and equitable; and it is here contended by the defendant's counsel that they can not both be united in the same action.

The facts set forth in both the complaint and the amended complaint are substantially the same. It is only in the relief prayed that they differ.

We have certainly made but little progress in the reform that has been attempted, if law and equity can now only be administered

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Getty agt. The Hudson River Rail Road Co.

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in separate actions. If such is held to be the present rule of practice, the very object of having law and equity administered in the same tribunal and in the same forms of proceeding will be defeated. It was formerly considered a great evil that in a suit at law the plaintiff could be turned out of court, on the ground that his relief was in chancery; and that where a bill was filed in the Court of Chancery, it might be dismissed, on the ground that the complainant had an ample remedy at law. The evil is still just as great as it was formerly, if a party can have only legal or equitable relief in the same action. In such case, if he commences his action asking for equitable relief, as for instance a specific performance, and it turns out that he is not entitled to it, but only to legal relief, by way of damages, he might perhaps, if such strictness is to govern, be put to a new action to obtain redress. This certainly ought not to be; and such a strictness is hostile to the whole spirit of the change that has been made. In trying such a cause at the circuit, I should most certainly allow whatever amendment in the pleadings was necessary to give the party redress. If the plaintiff had asked for equitable relief, and it turned out that he was entitled to legal relief only, I should permit him to take it in that form. And if he had asked for legal relief only, when he was entitled to both legal and equitable relief, I should allow the proper amendment to administer complete justice in the case. The power to amend, authorized by the Code, is ample for such purpose. Now the last case of amendment I have mentioned as permissible at the circuit, is precisely what is claimed in this case, with this difference only, that it is claimed to be made here, before issue joined, and when, of course, the defendant has abundant time and opportunity to prepare to meet the claim at the circuit.

I see no objection in this case to uniting claims for both legal and equitable relief in the same action. Both depend on the same transaction and both are necessary to indemnify the plaintiff for past, and to protect him against future injury.

I think the proper course, under our present system of practice, is to give the party whatever relief is applicable to the facts put

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Southworth and others agt. Curtis.

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in issue in the pleadings and established on the trial, whether such relief be legal or equitable, or both. And I see no reason against uniting in one action claims for both legal and equitable relief, when they are not inconsistent with each other (*Linden agt. Hepburn*, 5 *How. Pr. R.* 188). Substantial justice must no longer be sacrificed to mere form and technicality.

It is said that different modes of trial are prescribed for legal and equitable issues. But they are not necessarily to be tried differently, for § 254 of the Code gives ample power to the Court to direct that the latter class be tried before the same tribunal, which is prescribed by sections 252 and 253 for the former class. Nor is the distinction at all material; in as much as the court adjudges the relief in all cases, both legal and equitable, on the facts established, whether they were found by the court itself, or by a jury.

I think the amended complaint is regular, and the motion must therefore be denied with \$10 costs.

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## SUPREME COURT.

### SOUTHWORTH AND OTHERS agt. CURTIS

Where a plaintiff in verifying a complaint, swears positively that it is *true*, it is in law swearing that it is "*true to the knowledge*" of the plaintiff, as required by § 157 of the Code.

A notice of assessment to the defendant in an action on contract for the recovery of money only, under § 246 is not necessary where the complaint is properly verified.

*Pulaski Circuit and Special Term, November 1851.* This action is founded upon two promissory notes given by defendant to the plaintiffs. A demurrer to the complaint was overruled as frivolous and judgment ordered for the plaintiffs, which was accordingly entered without giving to the defendant or his attorney, a notice of assessment under section 246 of the Code. This motion is made to set aside the judgment as irregular, for the want of such notice. Notice of appearance by an attorney for



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Southworth and others agt. Curtis.

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the defendant in the action was served simultaneous with the demurrer.

The affidavit verifying the complaint, and upon which the question arises, is in these words: "Madison county, ss: Philip F. Southworth, one of the plaintiffs in the above entitled cause, being duly sworn says, that he has heard the foregoing complaint read, and that *it is true*, except as to the matters stated on information and belief, and as to those matters he believes it to be true."

On the argument it was not disputed that Southworth was a party to the action as recited in the affidavit.

Every averment in the complaint, the execution of the notes, delivery to the plaintiff, and indebtedness, is stated positively, not upon information or belief.

L. FOWLER, *for the Motion*.

J. P. WHITTEMORE, *Opposed*.

HUBBARD, Justice.—The question on this motion is as to the sufficiency of the affidavit verifying the complaint. The particular objection is that under section 157 of the Code, it should have stated that the complaint was *true to the knowledge* of the party deposing. It is, however, to be observed that the Code does not prescribe the *form* of the affidavit, but requires when made by a party to the action, that it shall be to the *effect* that the complaint is true to his knowledge, except as to matters stated on information or belief, and as to those he believes it to be true.

I regard this affidavit as a sufficient verification. The complaint contains positive averments of a cause of action; nothing is alleged on information, and hence the affidavit verifying its truth, implies that it is to *the knowledge* of the deponent. That this is its legal effect, is apparent from the consideration that if untrue or false, or in other words, if the party deposing had no knowledge whatever of the truth of the complaint, he might be indicted for perjury.

Upon trial it is always understood, when a witness swears to

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Southworth and others agt. Curtis.

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the existence of a fact material to the controversy, he swears from his *personal knowledge*, although he does not in words so state; and if his testimony proves to be false, or he had no knowledge of the fact to which he affirmed, an indictment would lie. The law regards the substance, the intent and legal effect of the oath, rather than its phraseology, on the question of perjury.

In this case the plain import and intent of the affidavit is to verify absolutely, and upon sufficient knowledge, the truth, of the complaint. If the words "to deponent's knowledge," had been added, its legal effect would have been precisely the same.

The Codes of 1849 and 1851 are not materially different on the subject of verifying the complaint. The latter in addition to the former, requires that in a case of several plaintiffs united in interest, the affidavit must be made by some one *acquainted with the facts*.

It was supposed that this affidavit was defective in not stating that the deposing party was acquainted with the facts. But this objection has already been answered in the construction given to the affidavit, nor do I think taking this portion of the section with the preceding, that it shows that the legislature in amending section 157 intended that the affidavit should specifically state that the party making it, when one of several plaintiffs united in interest, was acquainted with the facts. It seems to me clearly where a party swears positively that a pleading is true, he must in law be understood as swearing that he *knows* it to be so, and if untrue, or he does not know it to be true, he must abide the consequences of wilful and corrupt perjury.

This affidavit I therefore deem sufficient; and as the complaint was properly verified, no notice of assessment before the clerk was essential, and the motion must be denied, with \$10 costs of opposing.

## SUPREME COURT.

WARD agt. DAVIS AND OTHERS.

An issue of law on demurrer, under the Code of 1849, might be brought on to argument at a special term held in a different county in the district from that indicated as the place of trial in the complaint, without first applying to the court to change the place of trial.

*Fulton Special Term, April 1851.*\_\_\_\_\_, *for Plaintiff.*\_\_\_\_\_, *for Defendants.*

WILLARD, Justice.—This action was brought against the defendants as directors of the Saratoga and Schenectady Rail Road Company, to recover damages sustained by the plaintiff, by reason of a defect in the road. The defendants have demurred to the complaint. The place of trial indicated in the complaint is Saratoga county. The plaintiff now moves for judgment on the demurrer, at the special term in Fulton county; and as the defendants do not appear to argue the demurrer, the question is, can an issue of law be brought to trial in a county other than that designated in the complaint, where no special order has previously been made by the court, changing the place of trial.

A trial is defined by the Code, to be the judicial examination of the issues between the parties, whether they be issues of law or of fact (§ 252). These issues, whether of fact or of law, are required to be tried before a single judge, as follows: issues of fact at the circuit court, and issues of law at a circuit court or special term (§ 255). An action like the present, is required to be tried in the county in which the parties, or any of them shall reside at the commencement of the action, or if none of the parties shall reside in the state, the same may be tried in any county which the plaintiff shall designate in his complaint; subject, however, to the power of the court to change the place of trial in the cases provided by law (§ 125). The complaint states that the place of residence of the plaintiff was, at the time of the

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Ward agt. Davis and others.

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commencement of this suit, in the county of Saratoga; and he has designated that as the place of trial.

If the foregoing provisions of the Code are to be construed literally, Saratoga is the county where this issue of law as well as the issue of fact is to be tried.

But I am of the opinion that title 4 of part 2 of the Code (§ 123 to 126) relates exclusively to the trial of *issues of fact*. The 125th section recognises the power of the court "to change the place of trial in the *cases provided by statute*." The statute there referred to, is article 1, title 4, ch. 7 of part 3d of the Revised Statutes (2 R. S. 409), entitled "of the trial of issues of fact," and it provides in express terms, *for issues of fact which are to be tried by a jury*, and for no other cases. Issues of law under the former practice, were always heard at the general term, without reference to the place where the venue was laid. The judiciary act of 1847, confined the trial of *issues of fact* to the county where the parties, or some of them resided, and in certain cases, where the venue was laid. It left issues of law to be brought to argument as formerly, without reference to the venue (*Laws of 1847*, 333, § 46, *et seq.*). The reason for confining the trial of an issue of fact to a particular locality, does not apply to the trial of an issue of law. The convenience of witnesses has nothing to do with the argument of a demurrer.

The whole embarrassment in this case has been created by adopting a new definition to the word *trial* in § 252. This word at the adoption of the Code, and for the two hundred years previous, was understood to mean, the examination before a competent tribunal, according to the laws of the land, of the *facts* put in issue, for the purpose of determining such issue (*Burrel's Law Dict.*, title *Trial*; 3 *Bl. Com.* 330; *Stephens' Pl.* 76, 77). The word was formerly used in a broader sense, according to Coke, and comprehended issues of law as well as of fact (*Co. Lyt.* 125, *a. b.*). But even then, it was usually applied to the determination of questions of fact; and all the commentary of Coke upon the nature and locality of trials is predicated exclusively of trials of matters of fact (*see Co. Lyt.* 125,



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Robb agt. Jewell.

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*a. b. &c.*). The Code recognizes two sorts of issue, namely, an issue of law and an issue of fact, and it provides for trial of an issue of law by the court, or a referee, and an issue of fact by a jury, by the court without a jury, and by a referee. It fixes the place of trial for issues of fact, and provides for changing it for sufficient reason, but makes no such *express* provision for the trial of issues of law. Effect can be given to all the provisions of the Code, if we construe title 4 of part 2 of the Code (§ 123 to 126), as providing only for *issues of fact*. The practice then, with reference to issues of law, will be left as it was before the Code, so far as relates to locality. The argument of a demurrer may, therefore, be brought on at any special term in the district, or at a special term in a county adjoining that in which it is triable, though in another district (*Code*, § 401); except that when the action is triable in the first judicial district, the motion must be made there (*id.*).

I should not hesitate, therefore, to take cognizance of this demurrer, at this special term, though the place of trial is Saratoga, were it not for a defect in the papers.

The plaintiff is at liberty to withdraw the motion.

NOTE.—Since the foregoing decision the legislature have altered the 252d section of the Code, so as to leave no doubt that an issue of law may be brought to argument at any general term in the district.

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## SUPREME COURT.

ROBB agt. JEWELL.

Where a new trial is granted on application of the defendant, a copy of the order must be served on the plaintiff's attorney before the defendant can move for a dismissal of the complaint, for not proceeding to trial. Otherwise, where a new trial is granted on motion of the plaintiff,

*Albany Special Term, November 1851.* This was a motion to dismiss the complaint, under rule 23.

J. BRUYN, *for Defendant.*

J. HARDENBURGH, *for Plaintiff.*

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Robb agt. Jewell.

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PARKER, Justice.—The defendant moves for a dismissal of the complaint, on the ground that the plaintiff neglected to bring this cause to trial at the Ulster circuit, held on the 27th of last October.

It appears by the affidavits that this cause was tried at the Ulster circuit in April 1850, when judgment was recovered by the plaintiff. The defendant appealed and judgment was reversed, and a new trial ordered at general term in September last. The defendant's attorney states in his affidavit that more than twenty days before the circuit, he served on the plaintiff's attorney a copy of the order granting a new trial. The plaintiff's attorney swears that no such paper was served on him. On the evidence before me, therefore, the defendant has failed to establish the service of the order.

It was decided in *Jackson vs. Wilson* (9 *John. R.* 265), that where a verdict is set aside and a new trial granted on motion of the defendant, a copy of the rule must be served on the plaintiff's attorney before the defendant can move for non suit for not proceeding to trial. But where the new trial is granted on the plaintiff's motion, he must proceed to trial without notice from the defendant, or he may be nonsuited (*Jackson vs. Johnson*, 7 *Cowen*, 419). I see no reason for changing this practice under the Code. The service of a copy of the order being therefore necessary in this case, and it not being affirmatively shown to have been served, the defendant is not in a situation to move for a dismissal of the complaint.

The defendant also seeks to sustain this motion on the ground that the plaintiff is a *feme covert*, and has not sued by guardian. Conceding that the affidavits and notice are properly framed to raise this question, which is at least doubtful, yet, it appearing by the opposing affidavits that the same question has been before raised on motion and decided against the defendant, this motion can not be sustained on that ground.

This motion must, therefore, be denied, with \$10 costs.

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Whalen agt. The Board of Supervisors of Albany County.

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## SUPREME COURT.

WHALEN Appellant agt. THE BOARD OF SUPERVISORS OF THE  
COUNTY OF ALBANY Respondents.

A written stipulation by the parties to refer a cause to a referee "*to hear and report thereon*," is sufficient to confer jurisdiction and sustain the judgment, although the referee may *not have been sworn*, or a *rule of court* entered upon his appointment. The court will order a rule entered *nunc pro tunc*, if necessary. (*This appears to overrule the decision in Litchfield agt. Bennett*, 5 How. Pr. R. 341.)

Where the parties appear and argue the cause before the referee, without objection, it is a waiver of such defects.

*Albany General Term, December 1851*—HARRIS, PARKER. and WATSON, Justices. This was an appeal from an order of Justice Wright at the Albany special term, held in May 1850.

The cause was referred by a written stipulation of the parties in January 1850, to a referee, "*to hear and report thereon*."

The referee on the hearing decided that the complaint did not state facts sufficient to constitute a cause of action, and reported that nothing was due the plaintiff. Judgment was entered by defendants on the report.

The plaintiff moved to set aside the judgment for irregularity, on the ground that the referee *had not been sworn* in the cause, and on the ground that *no rule of court* had been entered upon the stipulation appointing the referee.

The motion was denied, and the plaintiff appealed.

C. PEPPER, *for Appellant*.

AUSTIN & McMAHON, *for Respondents*.

By the Court, Harris, Justice.—The only question in this case is whether the defects specified are sufficient to warrant us in setting aside the judgment. These defects, such as they were, were waived by the plaintiff appearing before the referee and arguing the cause without any objection. Besides, we think, the stipulation by its terms was sufficient to confer jurisdiction upon the referee, and we should feel bound, even now, to order

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Hornfager agt. Hornfager.

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a rule of reference to be entered upon it *nunc pro tunc*. The decision of the judge below must be affirmed in this and the four other causes depending on the same question, with ten dollars costs.

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## SUPREME COURT.

HORNFAGER agt. HORNFAGER.

Where it does not appear from the face of the complaint that another action is pending for the same cause, the objection should be stated as a defence in the answer (§ 147), otherwise by demurrer (§ 144).

And this applies to actions for partition.

*Columbia Special Term, October 1850.* This was a motion by plaintiff to set aside the proceedings in an action for partition, commenced by the defendant, on the ground that an action for the partition of the same premises had been previously commenced by the plaintiff.

J. C. NEWKIRK, *for Plaintiff.*

A. L. JORDAN, *for Defendant.*

PARKER, Justice.—Where it appears by the complaint that there is another action pending between the same parties for the same cause, the remedy is by demurrer (*Code*, § 144, *sub.* 3). When any of the matters enumerated in section 144 do not appear upon the face of the complaint, the objection may be taken by answer (*Code*, § 147). This is applicable to a suit brought by a defendant for partition. It is a suit between the same parties for the same cause.

The remedy is to set forth in the answer in the suit last commenced, the fact of the pendency of the first suit commenced.

Motion denied, but without costs.



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Gridley agt. Daggett and another.

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## COURT OF APPEALS.

GRIDLEY Respondent agt. DAGGETT Adm'r &c., and another,  
Appellants.

There must be an *actual* determination of the cause by the court below, in order to sustain an appeal to this court.

That is, a cause submitted to the court below on stipulation of the respective attorneys, and judgment entered *pro forma* for the purpose of bringing an appeal to this court, will not answer.

*January Term, 1852.* This was an appeal from a judgment of the Supreme Court in the 5th judicial district.

D. H. MARSH, for the appellant, commenced the argument. During his opening the court enquired how this cause got here? Mr. MARSH stated that it was submitted by stipulation of the respective attorneys, to the general term of the Supreme Court; and he had understood that in consequence of one of the justices being a relative of one of the parties, and another having been counsel in the cause, the court did not examine the case, but at the suggestion of counsel, under the stipulation, judgment was entered, with a view to an appeal to this court.

N. HILL, JR., for respondent, thought the appeal did not come within the provisions of the Code, which required an actual determination by the Supreme Court; still, he did not wish to take the objection. If the court would hear the cause, he was willing to argue it upon its merits.

RUGGLES, Ch. Judge, said the court were of opinion they had no discretion, the statute was imperative—there must be an *actual* determination by the court below (*Code*, § 11).

Appeal dismissed, without costs.

## SUPREME COURT.

## CHURCH agt. RHODES AND OTHERS.

The provisions for reviewing a report of referees, by a rehearing, under § 272 of the Code of 1849, is *repealed* by the Code (or act) of 1851.

And this repeal applies to pending and inchoate proceedings; that is, to actions commenced before the passage of the act of 1851, and in progress for a rehearing at the time of its passage. There is no saving clause in the act, and it sweeps away every thing except a vested right, such as a judgment.

Where judgment has been entered, and the right to appeal has been lost (by proceedings instituted for a rehearing), the court has no power to grant any relief under the provisions of § 468 of the Code. But the party seeking relief in such a case should be allowed a motion to set aside the judgment, with a view to its being entered anew, in order to have an opportunity to bring an appeal.

*Oncida Special Term, December 1851. Motion to set aside the report of a referee.* This cause was tried in the month of December 1850, before the referee, and the report was made on the 26th of March 1851, on which a judgment was entered on the 12th of April, and notice thereof served on the attorney for the defendant, Rhodes, on the 26th of the same month. Time was given, and proceedings were stayed from time to time, for the making of a case, and until the report should be settled and the case finally disposed of. On the 26th of April a case was prepared with a view to a rehearing of the cause, and a copy thereof served, and such proceedings were thereafter had that the case was finally settled by the referee in the latter part of October last.

A preliminary objection has been made and argued to the hearing of this motion, on the ground that the mode of reviewing a report of referees by way of rehearing, has been abolished by the Code of eighteen hundred and fifty-one.

GEO. F. COMSTOCK and W. V. SCHAACK, *for the Motion*  
J. RUGER, *Opposed.*

GRIDLEY, Justice.—I have no doubt that proceedings were commenced in good faith, preparatory to a review of the report by a rehearing soon after the entering of the judgment. These

proceedings, however, were imperfect and inchoate, until long after the statute under which the right to review a report by rehearing was conferred, had ceased to be the law of the land. And the question presented for decision is, whether the defendant, having commenced proceedings to obtain a review of the report, and having lost the right to appeal before the law was changed, may now perfect the proceedings and have the cause reheard under the former act.

1. The counsel for the defendant conceded that the mode of reviewing a report of referees, by a rehearing under the last clause of section 272 of the Code of 1849, was *abrogated* by the Code of 1851. Indeed, when the only provision in the act of 1849, under which a rehearing was authorized, is omitted in a revision of the act in 1851, and section 346 of the Code is so changed as to allow an appeal to be brought for errors of fact, as well as of law, it would seem that no doubt could exist as to the intention of the legislature. But the 465th section expressly repeals all statutory provisions inconsistent with this act; and by necessary construction, utterly erases from the statute book all provisions of the antecedent Code that are not found in the present enactment. Again, this construction is confirmed by the 459th section. This section is found among the provisions relating to existing suits, and applies the provisions of the act (*Code of 1851*) to the proceedings in the several stages of a suit; and in the third subdivision it applies the provisions of the Code (of 1851) “after a judgment or order, *to the proceedings to enforce, vacate, modify or reverse it*; including the costs of the appeal.” It would be singular indeed, if the provisions of the Code of 1851, should be applied to this mode of reviewing a judgment in an action commenced before the Code, and not to a case commenced under the Code of 1849. In my judgment, therefore, the act of 1851, repeals the provision in the Code of 1849, authorizing a review by a rehearing, as perfectly as if it had repealed it in express terms.

2. We come now to a consideration of the effect of the repeal of this provision upon inchoate proceedings commenced when it was in force, and where no rights are saved in the repealing statute. Where a statute gives a penalty, and is repealed, without a saving of the cases in which suits have been commenced

under the law, the action fails in every stage of it before judgment. By a judgment the *right* becomes *vested*, but even after conviction the judgment will be arrested (*Yates vs. U. States*, 5 *Cranch*, 281; *Schooner Rachel vs. The Same*, 6 *id.* 329; 4 *Dallas*, 372; *Pope v. Lewis*, 4 *Ala.* 487; 1 *Binny*, 601, 608; *Miller's case*, 1 *Bl. R.* 451, and 3 *Burrows*, 1456). The same rule applies to civil cases as appears by a statement of the case cited from *Burrows*. Miller was an imprisoned insolvent, and had assigned his property under what was called the compulsory clause of the act, and was entitled to his discharge on the 26th of September 1761. By a subsequent act (already passed), the provision for his discharge was repealed, to take effect on the 19th of the ensuing November. The insolvent demanded his discharge, but the sessions delayed it till after the repeal attached, and his discharge was then refused. On a motion for a mandamus, to compel the justices to grant the discharge, Lord Mansfield refused it, saying, that "*no jurisdiction remained in the sessions.*" The decision in the case of *Surtee vs. Ellison* (4 *Man. & Ryl.* 586, 588, and 9 *Barn. & Cres.* 750); and in *Maggs vs. Hunt* (4 *Bingh.* 212); and in *The People vs. Livingston* (6 *Wen.* 526, 530), proceeded upon the same grounds. And though the judges lamented that important acts should be passed without any saving clause as to proceedings already commenced, they yet felt bound to say that a repealing statute acted directly on all pending proceedings, and deprived the courts of all power to give any relief. The same doctrine has been applied to the case of costs. Where an appeal from a justice's judgment was taken under the law existing before the Revised Statutes, under a particular act, by which the Court of Common Pleas gave the appellee costs, but before the trial of the cause the Revised Statutes had taken effect, which gave the appellant costs, if he reduced the amount of the recovery ten dollars, and the Supreme Court granted a mandamus to correct the error (4 *Wend. R.* 210). Again, the act of 1840, materially altered the fee bill of attorneys of the Supreme Court; but it saved the rights of suitors who commenced proceedings before the day when the act took effect. A subsequent act, among other things, repealed this saving clause; and after that the Supreme Court held, that all bills of costs, whether commenced before or



after 1840, should be taxed under the new act. The rule has been settled in a great variety of cases, that all pending proceedings, and all inchoate acts are swept away by a repealing statute, without a saving clause. Mr. Dwaris says (*Dwaris on Stat.* 676), "where an act of parliament is repealed, it must be considered (except as to those transactions, *passed and closed*) as if it never existed." I agree with the defendant's counsel, that a construction is reluctantly given to an act, which will have a retroactive bearing, and it requires a clear and unequivocal expression of the legislative will, to deprive the courts of this power over pending and inchoate proceedings; but when that will is plainly expressed, the courts have no jurisdiction over open and unfinished proceedings. Whenever the proceeding, is *closed*, and the *right vested* by a judgment, or other *decisive act*, the repeal does not affect such *vested right*; but short of this, the courts are as powerless to give a party relief as if the act under which the proceedings were commenced, had never existed (see *Butler vs. Palmer*, 1 *Hill*, 333 to 336, where this whole subject is discussed with great learning and research).

It remains only to consider the effect of a provision found in the 468th section of the Code. It reads as follows: "If a case shall arise, in which an *action* for the enforcement or protection of a right, or the redress or prevention of a wrong, can not be had under this act, the practice heretofore in use may be adopted, so far as may be necessary to prevent a failure of justice." This section is found among the "general provisions," and was inserted in the former Code, in the same language, as it is in the present one. It was not intended to provide for a case in which a difficulty might arise out of the repeal of a provision in a former Code, for it was an enactment contained in the former Code itself; but it was a wise provision made by the legislature, lest in the radical change introduced by a new and untried system, that system might be found not to be adapted to all exigencies, and might leave some cases without the appropriate remedies. The legislature foresaw that there might be instances, like that of *Crane agt. Sawyer* (5 *Howard's Pr. Rep.* 372), in which the forms of the proceedings sanctioned by the Code, could not be applied to the case; and therefore, in such instances, they

authorized a procedure under the former system, so far as to prevent a failure of justice. Again, "*the practice heretofore in use,*" means the practice which prevailed before the Code of procedure; *but* there never was a practice, before the Code, of reviewing a report of referees, *after a judgment*. Nor was there ever a practice before the Code of submitting a chancery cause (which this is) to a referee, and then reviewing the decision at a special term. It is, therefore, quite clear, from these and other considerations, that the clause in question can not aid the defendant.

What then is his remedy? The defendant might have reviewed this report on the judgment *by appeal*. That remedy still remains, but the period has elapsed for bringing an appeal; so that a motion must be made to set aside the judgment, with a view to its being entered anew in order that the defendant may have an opportunity to review the judgment by appeal. There is a peculiar reason for granting this motion, arising out of the effect of the repeal of the provisions in the act of 1849, under which the proceedings in this case were instituted; and relying upon which the defendant forbore to give notice of an appeal until it was too late. In truth, the defendant should have had an order staying the entry of judgment until the case was settled and filed. The 2d subdivision of section 281, by expressly including the case or bill of exceptions among the papers, which are put together to constitute the judgment record, and that the review of the judgment takes place on the case, unequivocally shows that the entering of judgment should be stayed till the case is settled. Had this course been taken no rights would have been lost. The defendant should be *relieved*, however, as this is a case on the merits eminently worthy of being reviewed.

This motion is therefore denied on the preliminary objection, and if the defendant elects, he may have the judgment set aside *pro forma*, and immediately reentered, by the paying any disbursements that may attend the reentry of the judgment, and ten dollars for opposing the motion.

## SUPREME COURT.

JONES AND OTHERS agt. PORTER AND OTHERS.

The court will not regard fractions of a day, in judicial proceedings, unless to prevent injustice (4 Comst. 481; see same case, 5 How. Pr. R. 200).

And it seems this rule will be adhered to in considering a jurisdictional question.

Where the plaintiffs made an affidavit and procured a judge's order requiring the defendant to appear and answer, and an injunction to issue, &c. about two hours before the execution, returned *nulla bona* by the sheriff, had been actually filed in the clerk's office, but on the same day; the plaintiffs supposing that the execution had been filed (it having been delivered to a messenger for that purpose, but who neglected to file it as soon as was intended), held, that the fractions of the day should be disregarded, and the plaintiffs' proceedings considered valid.

At all events, the plaintiffs might have an order to file the execution *nunc pro tunc* previous to the issuing of the judge's order.

*Albany Special Term, January 1852.* In this case a judgment was recovered on 12th January 1852, for \$514.88. On the same day an execution was issued to the sheriff of Albany county. On the 13th of January, at a few minutes before ten A. M., the sheriff endorsed his certificate of *nulla bona*, and delivered the execution to a clerk in the office of the plaintiffs' attorney, for the purpose of having it filed in the clerk's office. Through inadvertence the person to whom the sheriff delivered the execution, neglected to take it immediately to the clerk's office, and it was not filed in the clerk's office until four o'clock P. M. on the same day. In the mean time the attorney for plaintiffs, having been informed and believing that the execution had been returned unsatisfied, proceeded, about two o'clock on the same day, to make the necessary affidavit of facts, and procured from the county judge of Albany county an order requiring the defendant Porter, to appear and answer concerning his property, and an injunction restraining him from interfering with his property. The order was immediately served and was returnable the next day at nine A. M.

On the return of the order, the defendant Porter, appeared and objected that the execution was not actually filed at the time the

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Jones and others agt. Porter and others.

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order was made and served, and claimed that the proceedings were therefore irregular and void.

Thereupon the plaintiffs' attorney obtained a stay of proceedings, and moved, on notice, for an order that the clerk file the said execution *nunc pro tunc*, as of ten o'clock A. M., on the day it was received by him.

H. HARRIS, *for Plaintiffs*.

S. O. SHEPARD and A. J. COLVIN, *for Defendants*.

PARKER, Justice.—The affidavit was sufficient upon its face to give the officer jurisdiction of the proceeding at the time he issued the order. But though the return of *nulla bona* had been duly endorsed by the sheriff, and he had sent it on its way to the clerk's office before the affidavit was made, it did not in fact reach the clerk's office, and was not filed, till two hours after the making of the affidavit and the issuing of the order. It was, however, duly filed on the same day the proceedings were commenced, and before the objection was taken before the officer.

It was undoubtedly competent for the defendant to controvert any material fact set forth in the affidavit on which the order was made; and if it could be done successfully, to defeat the proceeding. But it must be remembered that fractions of a day are not enquired into by the court, except for the purpose of guarding against injustice. So the Court of Appeals have recently held in *Blydenburgh vs. Cotheal* (4 *Comst. R.* 418). In that case an appeal was taken to the Court of Appeals from a judgment rendered in the Supreme Court, before the costs were adjusted and the judgment roll filed, though on the same day; and the court of last resort refused to dismiss the appeal, holding that the fraction of a day ought to be disregarded. There was as much of a jurisdictional question in that case as in this. There could be no ground for appeal, and nothing to appeal from, until the judgment was entered.

In *Small vs. McChesney* (3 *Cowen*, 19), execution was issued and levied between two and four o'clock in the morning, but the judgment record was not filed till four P. M. on the same day. On motion to set aside the proceedings, the court said, "the whole proceeding is on the same day, which the law will not



divide into fractions, unless this be necessary for the purpose of guarding against injustice," and the motion was denied. Under a different rule, the execution would have been void, and the party and attorney liable in trespass; but the court held the execution supported by the judgment, though over twelve hours intervened.

In *Clute vs. Clute* (3 *Denio*, 262), a motion was made to set aside an execution issued at two o'clock P. M., the judgment not having been docketed till four o'clock P. M. At a still later hour, and after levy made, the defendant had executed a general assignment for the benefit of his creditors. But, notwithstanding this latter circumstance, the court, under the rule I have mentioned, refused to set aside the execution.

It is shown in the case before me, that after the service of the order on the defendant, he proceeded to make an assignment to some of his creditors, who were his confidential endorsers; and the fact that such assignment will be effectual, if the proceedings before the county judge are not sustained, is urged as a reason why the fractions of a day in this case should not be disregarded. The defendant would have stood on much firmer ground if he had made a general assignment for the benefit of his creditors; for as to them, equality is equity. But even a general assignment, made under such circumstances, would not have furnished a sufficient reason for holding the proceedings of the vigilant creditor irregular, as was decided in *Clute vs. Clute*, above cited.

In this case the return was duly endorsed, and the execution was delivered to a person to take to the clerk's office, in due season. It ought to have reached the clerk's office within a few minutes after such delivery, and would have done so, but for the inadvertence of the messenger. When the affidavit was made, and the order granted, there was reason to suppose it had been duly filed. It was in fact filed within two hours after the making and service of the order, and long before the objection was taken on the return of the order. The voluntary assignment made to certain preferred creditors was made and taken with a full knowledge of the fact that the execution was then filed. The objection rested, therefore, on a mere technicality, which has in no respect prejudiced the defendant. I see no reason whatever to

take this case out of the well settled general rule that fractions of a day are to be disregarded.

But if there is any necessity for relief by amendment, the authorities that warrant it are abundant and controlling. In *Seaman vs. Drake* (1 *Caines R.* 9), judgment was amended *nunc pro tunc*, after a lapse of several terms, by allowing the clerk to sign the roll. In *Close vs. Gillespy*, a judgment defectively entered upon warrant of attorney, was permitted to be amended *nunc pro tunc*, and an intervening judgment creditor was not permitted to avail himself of the irregularity. In *Chichester vs. Candee* (3 *Cow. R.* 39), a creditor had issued execution and levied on property, and had by mistake omitted to file his judgment record. Another execution was then regularly issued by another creditor and levied on the same property. The first creditor was permitted to file his record *nunc pro tunc*, so as to support his execution and retain the preference in the proceeds of the sale. In *The Bank of Rochester vs. Emerson* (10 *Paige*, 359), an amendment was permitted after a lapse of nearly a month, by filing and confirming a report on which an execution had been issued for a deficiency, but without prejudice to the rights of creditors under a general assignment in the mean time executed. This exception was made, on the ground that the irregularity had been willful, and in view of the principle that equality among creditors was equity.

The case of *Bradford vs. Reed* (2 *Sand. Ch. R.* 163), was still more like the case under consideration. It was a creditor's bill, and the defendant had set up in defence that the execution had not been returned and filed. Although that was the question in controversy, the plaintiff was permitted to avail himself of a rule of the Supreme Court, made *ex parte*, permitting him to file another execution *nunc pro tunc*, in place of one proved to have been mailed, but which had never reached the clerk's office; and the opinion was expressed by the vice chancellor that the plaintiff might have had such amendment on notice.

All these, and many others to be found in the reports, are cases where amendments were allowed long after the omission, and except in one instance, without saving the rights of intervening claimants. In the case before me no such latitude of amendment

is asked; the difference of time being but two hours, with no intervening claim.

The motion must be granted on payment of \$10 costs of resisting the motion.

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## SUPREME COURT.

GRAY agt. NELLIS.

Where a count in a complaint in slander sets forth the speaking by the defendant at a day and place certain, actionable words, and alleges also, that *the defendant on divers days and times between that day and the commencement of this suit*, spoke the same words; a demurrer, assigning for cause that separate causes of action are united, or that the complaint is vague and uncertain, will not lie.

The words objected to may be struck out as redundant. They do not prejudice the defendant, as no proof would be admissible under them, which would not be admissible if they were stricken out.

*Montgomery Special Term, June 1851.* The complaint is in slander, and contains two counts, or separate statements. The first charges that the defendant on or about the 23d day of January 1849, *and on divers other days and times between that day and the commencement of this suit, at, &c.*, in a certain conversation then and there had *with divers good and worthy citizens, of and concerning the plaintiff*, then and there spoke (setting out actionable words, with proper inuendoes).

The second count charges that the defendant afterwards, and on the same day and year aforesaid, at the place aforesaid, in a certain other discourse which he, the said defendant, then and there had, in the presence and hearing of divers good and worthy citizens, of and concerning the plaintiff, falsely and maliciously spoke in the presence and hearing of the said citizens, of and concerning the plaintiff, these other false and slanderous words [setting them out], "*and also other words of like falsity and defamation, tending greatly to the injury of the character of the plaintiff.*"

The defendant demurred to the whole complaint, and assigned for cause to the *first* count that it charges for speaking words on

*divers different days and times, and thereby wrongfully unites separate causes of action;* also, that it is vague and uncertain. The demurrer assigns for cause to the second statement or count, that after setting out a specific charge, it charges the "*speaking of other words of like falsity and defamation, tending greatly to injure the plaintiff,*" without specifying where or when those latter words were spoken, or what they were.

H. ADAMS, *for the Defendant.*

T. B. MITCHELL and J. A. SPENCER, *for Plaintiff.*

WILLARD, Justice.—The objection to the first count is, that the speaking of the actionable words is alleged to have been on a day and at a place certain, and *on divers days and times between that day and the commencement of the suit.* It was not customary before the Code to allege the speaking of slanderous words with a *continuando*. If actionable words were spoken at different times, the proper way, if the plaintiff desired to prove them on the trial, in one suit, was to frame a count on each set of words. There were certain actions of trespass and case, where the act complained of might be charged to have been done on such a day, and such a year, and *on divers other days and times between that day and some other day*, mentioning the same. This was a substitute for the old mode of declaring with a *continuando* (1 *Saund.* 23, n. 1). But where the acts were of such a nature, that when executed they could not be done again, but terminated with the commission of them, it was necessary to insert as many counts as there were acts complained of; for they could not be laid with a *continuando*. If they were, says Sargeant Williams, objection should be made at the trial, and the plaintiff would not be permitted to give evidence of more than one act (see also *Gould's Pl.* 107, § 95). The plaintiff was not confined to the time in the declaration, but was at liberty to prove a trespass, if the action were trespass, at any time before the commencement of the suit (1 *Saund.* 24, n. 1). Mr. Chitty intimates that the objection might be taken by special demurrer (2 *Chitty's Pl.* 368, note s., ed. of 1809). And it was so held by the King's Bench in *English vs. Purser* (6 *East.* 395), in an action of assault and battery, following the case of *Michell vs.*



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Gray agt. Nellis.

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Neale (*Cowp.* 828), on the same point. But in the case of *Burgess vs. Freeloove* (2 *B. & P.* 425) it was held that trespass for an assault might be laid on divers days and times. It is true in the latter case, it may be said that the defendant committed so many different assaults on the different days. That might be bad for duplicity, but that was not assigned for the cause of the demurrer. That objection could only be taken by special demurrer before the Code (1 *Chitty* 513). Mr. Justice HAND, in *Boyce vs. Brown*, (7 *Barb.* 87), understands the 150th section of the Code as a statutory inhibition against duplicity, where it occurs in an answer. The same principle applies to the complaint (§ 167). Different causes of action must be separately stated (§ 167, 144, *sub.* 5; 4 *Howard*, 226; 5 *id.* 172; 3 *id.* 391; 7 *Barb. S. C.* 80). In the present case the count is not objectionable for duplicity, for only one set of words is set forth.

The objection assigned in the demurrer is not that the allegation of the speaking of the words on *divers days and times*, is *per se*, bad; but only that thereby separate causes of action are united in the same count. If that consequence has not been produced, the cause assigned for the demurrer fails. This case is distinguishable from *Durkee vs. The S. and W. Rail Road Co.* (4 *How. Pr. R.* 226), and *Pike agt. Van Wormer* (5 *id.* 171). There is no duplicity in this count. The plaintiff on the trial could only be permitted to prove the words specifically set forth. A repetition of the *same words* at other times, and to other persons, might be proved for the purpose of showing malice (*Root vs. Lownes*, 6 *Hill*, 518; 3 *Denio*, 346). The same authorities also show that actionable words, not laid in the declaration, are not admissible in evidence, and to the same effect is *Randall vs. Butler* (7 *Barb.* 260). The proper remedy of the defendant, in this case, is to object on the trial, to the proof of any words, not specifically set forth in the complaint. As the repetition of the *same words*, though spoken at different times, might be given in evidence, without being set forth in the complaint, it is not perceived how the case can be made worse for the plaintiff, or prejudicial to the defendant to allege in the complaint that the *same words* were spoken on divers days and times. A recovery for once speaking of them would be a bar to a fresh action.

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Mersereau agt. Pearsall.

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The cause assigned for the demurrer to the second count, is, that the plaintiff after setting out a sufficient cause of action, adds, "and also the defendant spoke other words of like falsity and defamation," &c. From what has been said, it is plain that the plaintiff could not give evidence on the trial of any other words than those specifically set forth. This allegation, therefore, amounts to no more than the "*alia enorma*" in the old precedents. It might, perhaps, be struck out on application to the court, as redundant, under § 160 of the Code, but its insertion in the count, in other respects good, will not render it demurrable.

There must be judgment for the plaintiff on the demurrer, with leave for the defendant to answer in twenty days after the service of a copy of the rule, on payment of twenty-two dollars costs.

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## SUPREME COURT.

MERSEREAU agt. PEARSALL.

A motion for new trial, or rehearing, on the ground of surprise or newly discovered evidence, may be made, and granted, after judgment.

Such a motion made, after an appeal to the general term is decided, will be denied, where it appears the grounds for the motion were known to the party before making the appeal.

A new trial will not be granted on an affidavit by a witness, that he was mistaken or surprised on his examination; and explaining and correcting the same. And especially where his testimony is cumulative, merely.

*Broome Special Term, December 1851.* This is a motion by the defendant to set aside the judgment and report of referees, made and perfected the 10th of May 1850, and for a new trial; which judgment was appealed from and affirmed at the general term of the Supreme Court, in September 1851. The motion is founded upon the affidavit of Mr. Wentz, an engineer, who was selected by the parties to take the water level of the Susquehanna river, in order to ascertain the effect which the defendant's mill dam had upon the plaintiff's mill wheels, further up the same stream—the action being to recover damages for flooding plaintiff's wheels.

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Mersereau agt. Pearsall.

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The affidavit of Wentz, now produced, in substance, states, that he made a mistake of one foot against the defendant in taking that level, and which mistake he discovered since the trial; and endeavors to account for it. The defendant's own affidavit is also produced, showing the importance of the mistake, on the trial, &c. On the other side, it is shown by the affidavit of this same Wentz, that he made no mistake in his former testimony, but that the difference in the two levels made by him, was owing to the difference in the volume of water in the stream, and to other causes. It is also shown by affidavit, and by the case made, containing the evidence used on the trial, that many witnesses were examined on the same questions that Wentz was; and that the change of his evidence from one side to the other would be only cumulative evidence. It is also shown by affidavit, that the defendant was fully apprised of the pretended mistake of Wentz prior to the argument of the appeal at general term, in September last.

MR. TOMPKINS, *for the Motion.*

MR. NORTHROP, *Opposed.*

SHANKLAND, Justice.—I am of opinion that a motion for a new trial, or rehearing, on the ground of newly discovered evidence, may be made, and granted, after judgment is entered on the report of referees.

It is true, that under the former practice, these motions must be made before judgment was perfected (4 *Hill*; 15 *J. R.* 354), and could not be made afterwards. But by the rules then existing, judgment could not be entered in vacation; and the defendant had four days in term after rule for judgment was entered, in which to make motions in arrest, and for new trials. But by the Code, judgments may be entered and perfected in vacation, and are peremptory (*Code of 1849*, § 272, 267; *Code of 1851*, § 272, 267).

If, therefore, a motion for a new trial, on the ground of surprise, or newly discovered evidence, comes too late after judgment, the defendant would practically be denied the benefit of such motions, in all cases. But in this particular case, the defendant, instead of moving for a new trial, for the reasons set

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Mersereau agt. Pearsall.

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forth on this motion, appealed to the general term; and did not move until he was beaten at the general term, on such appeal.

In this respect he was guilty of great laches; because he was well aware of the mistake Wentz had made, before the argument of the appeal. It seems to me this fact should defeat the motion.

But there is another and authoritative answer. In the case of *Steenbach vs. The Columbian Insurance Co.* (2 *Cai. Rep.* 129), it was held that a new trial will not be granted on an affidavit by a witness, that he was mistaken, or surprised on his examination; and explaining and correcting the same.

In the case before me, Wentz testifies to his mistake on the former trial, or rather that on taking the level of the river subsequent to the trial, he finds a difference of one foot in the fall, between the two dams, from what he found it on the first examination; and he further states that he can not account for that variation, except upon the supposition that he made a mistake on the first examination. It may be that where but one witness proves a fact material and necessary to sustain a verdict or report, and that witness subsequently discovers that he has made an honest mistake, and imparts the fact to the party, beaten, he may obtain a new trial, if he uses due diligence. But where the evidence of the witness was in fact merely cumulative, and only conspired with other testimony on the same point, to produce the verdict, or report complained of, I think the mistake of the witness should not produce a new trial. In such case, the subtraction of the witness from the number produced by the plaintiff, and adding him to the number produced by the defendant, would be no more nor less than cumulative evidence. Very few causes are tried, in which some witness on the part of the successful litigant does not make mistakes in respect to some fact, testified to by him; and if the affidavit of a witness to his own mistake is to procure a new trial, there is no reason for prohibiting affidavits of third persons, to show the witness mistaken, although he should not himself confess it, or should even deny it. In this case many other witnesses besides Wentz, testified to facts tending to prove the defendant's dam the cause of the flooding the plaintiff's wheel, and it is not certain, or even probable, that the report would have been different, if his evidence had not been given.



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 Ellis agt. Jones, Sheriff, &c.
 

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But the plaintiff has read in opposition to this motion an affidavit of this same witness, made subsequent to the one read by the defendant, in which he takes back all he had said in his first affidavit, or substantially explains it away.

The whole foundation of the motion is, therefore, removed; and on this ground also, the motion must be denied.

Motion denied with ten dollars costs.

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## SUPREME COURT.

ELLIS agt. JONES, Sheriff, &c.

A defendant who seeks to open a judgment, which he has suffered voluntarily and under the advice of counsel, must show the court specifically, what his defence consists; general allegations will not answer.

A formal affidavit of merits under rule 39, should be made on such a motion. An affidavit of merits is defective which states that the defendant has stated "his case in this cause" to his counsel, instead of "the case," as required by rule 39. Such a statement is not equivalent to the statement that "he has stated his case" generally.

The particular grounds of a motion should appear plainly, either by the notice of motion or the affidavits.

*Oneida Special Term, December 1851.* Motion to open a judgment by default, and to be permitted to answer.

S. B. GARVIN, *for Motion.*

T. H. FLANDRAU, *Opposed.*

GRIDLEY, Justice.—This motion must be denied—

1. The judgment is regular, and was entered against the defendant by default, on the advice of counsel taken by the defendant, that he had no defence, upon a full knowledge of all the facts. Now, to set aside this judgment, so entered, and permit the defendant to come in and plead to the action, should not be allowed without a full and clear affidavit, explaining on what particular ground his defence rests, and the nature of his counsel's mistake. In an ordinary case, I am of opinion that an affidavit of merits, which

satisfies the 39th rule of this court, is sufficient; though it has been held in no less than three reported cases, that an affidavit of merits, under the Code, should state the special facts of the case, as was the practice in chancery. But I had occasion to say in *Dix agt. Palmer* (5 *Howard*, 236), that when there were any circumstances of a suspicious character, which raised a presumption against the defence, the affidavits should set forth the special facts of the transaction, and show the court *in what* the defence consists. I think this is a case requiring the facts to be set out. His counsel, on a full view of all the facts, advised him once that he had no defence; and it is impossible to resist the conclusion that the only circumstance that has created a doubt in his mind of the soundness of that advice, was the ruling of the circuit judge in another case; a ruling in which he has not acquiesced, but has taken measures to review. But it by no means appears that he has any defence, even if that ruling was right. There were three grounds on which the nonsuit was asked for in that other case, and that decision may be correct, and yet the defendant in this suit have no defence at all. Where a defendant has suffered a judgment voluntarily, and by advice of counsel, he must show the court what in his defence consists, when he asks to have the judgment opened. He should not be allowed to do this upon any general or uncertain allegations. But,

2. I do not think there is *any valid affidavit of merits* here. Swearing to a *defence*, as it is done in the principal affidavit, has been held insufficient in *McMurray and Thomas agt. Gifford* (5 *How. Pr. R.* 14), under rule 39; and the *formal affidavit* of merits is defective in the particular that the defendant swears that he had stated "*his case in this cause*" to his counsel, instead of stating "*the case*," as required by the 39th rule. It has been held that an allegation that "*he had stated his case*" generally, was equivalent to a statement of the "*whole case*" (22 *Wend.* 636); but a statement of "*his defence*," or "*the facts of his case*," has been held insufficient (2 *Hill*, 539). Now a statement of "*his case in this cause*" can mean no more than a statement of the facts on his side of the cause, or in other words, *his defence* (19 *Wend.* 617).

3. A third objection is that there is no *certain ground* of this

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Benedict agt. Seymour.

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motion stated in the notice, nor in the affidavit and judgment roll; one may look through all the papers, and still be at loss to know on what ground, in particular, he seeks to open this judgment. Motions have often been denied for this cause. This motion is denied, with ten dollars costs, but without prejudice to a new application.

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## SUPREME COURT.

BENEDICT agt. SEYMOUR.

In all cases in common law actions, where a *complaint* contains more than one cause of action, it must be divided into *distinct counts*, like a declaration at common law. The causes of action should be distinguished by the phrase, "And for a further cause of action the plaintiff complains," &c., or some other equivalent words.

A failure to do this, subjects every allegation which is not essential to a single cause of action, to be stricken out, if objected to, as redundant.

The *court* is not to be taxed at the trial, with the burden of analyzing every complaint which may contain several causes of action, thrown in together in one undistinguished mass, and separating them; nor is the defendant required to do this at his peril.

And in relation to *answers*, the Code is still more explicit; the provision (§ 150) which authorizes a defendant to put in several defences, says that "they shall each be separately stated, and refer to the *causes of action* which they are intended to answer in any manner by which they may be intelligibly distinguished." Thus showing that defences must be single and stated separately; and also showing that the causes of action should be separately stated. The words "And for a further defence" (or cause of action), &c. would probably be a sufficient designation.

How and to what extent has the Code changed the rules of the common law in regard to the mode of *stating defences*?

Whenever an answer contains a traverse or denial of any one or more of the material allegations in the complaint, every thing else which it may contain is redundant, and must be stricken out on motion; unless it belongs to a separate and distinct defence.

Every denial of the whole or any material portion of a complaint must stand by itself as a separate and distinct defence, and must be so pleaded.

Every special defence which consists of matter which goes to disprove any material allegation in the complaint is defective, and must be stricken out on motion.

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Benedict agt. Seymour.

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*Monroe Special Term, January 1852.*J. H. MARTINDALE, *for Plaintiff.*T. HASTINGS, *for Defendant.*

SELDEN, Justice.—This action is brought to recover for an alleged malicious prosecution. It is necessary to give a brief abstract of the pleadings, in order to present the points to be decided.

The complaint states that the defendant on the 25th day of April 1851, caused the plaintiff to be summoned to appear before a justice of the peace, to answer the defendant in a civil action; that the parties appeared and the defendant was nonsuited; and avers that the suit was without probable cause, and malicious. It further avers, commencing thus: "And the said plaintiff further states to the court" that on the 8th day of May the defendant commenced another civil suit against the plaintiff and one Samuel S. Bowne, before the same justice, in which he was afterwards nonsuited; and that this suit was also malicious and without cause.

The answer admits the commencement of the suit on the 25th day of April, but denies that it was without cause or malicious, and then adds as follows: On the contrary, the defendant distinctly avers that the suit was instituted and the said summons caused to be served without malice or any evil design, \*\*\*\* and as the defendant has been informed and believed, and does still believe, upon a good, just, reasonable and sufficient cause of action, hereinafter mentioned, &c. &c. It then proceeds in like manner to admit the commencement of the second suit on the 8th day of May, and to deny that it was malicious or without probable cause, and then again adds as follows: but, on the contrary, the said defendant avers that said suit was instituted and commenced, and said process served upon said plaintiff and said Bowne, \*\*\*\* upon a just, good and reasonable cause of action as is hereinafter set forth.

The answer then proceeds to set out at length what the defendant claims to have been a good cause of action in each of the suits so commenced; it also alleges facts in detail going to rebut



the allegations in the complaint of malice on the part of the defendant.

This, although not a full statement of the complaint or answer, is all that is necessary to raise the questions to be decided.

The plaintiff moves to strike out, as redundant, the affirmative allegations that the defendant had a good cause of action, following his denial of malice, &c. in regard to each of the suits; also, the subsequent statement in detail of such causes of action, as well as all the averments designed to rebut the allegations of malice.

The questions presented by this motion involves the construction of the Code in some of its most vital features. They can not be safely and properly decided without a careful analysis of its main provisions in regard to pleading. If the truth I may advance shall not be unmixed with error, I have this consolation, that the truth will stand, while the error will be swept away by the better light and better logic which will be brought to bear upon the subject by other minds.

Every one who has had any thing to do with legal trials under our new judicial system, must have observed that the pleadings are frequently framed with great looseness, and apparently without any very definite and precise notions as to the averments which they may properly contain. Hence, through fear of some fatal omission, much redundant matter is habitually inserted.

Many are thus led to infer that the changes which have been made with a view to simplify and abridge judicial proceedings, will have in the end an opposite tendency. This, however, is not my conclusion. On the contrary, I am persuaded that the provisions of the Code are calculated to produce both simplicity and symmetry as well as brevity, if construed with a liberal spirit, and in the light of those settled rules which wisdom and the experience of ages have sanctioned.

The present is a purely legal action, triable by jury. The remarks I make, therefore, are not intended to have any bearing upon an action which is equitable in its nature.

To put any just construction upon the provisions of the Code in respect to pleading, it is indispensable to compare those provisions with the established rules of pleading at common law.

The supposition that the latter had no foundation in reason can never be entertained by one who has carefully examined the subject. The Code requires us to adopt no such hypothesis, as I shall proceed to show.

First, then, it is plain that that rule of the common law which prohibited duplicity in pleading, is fully maintained by the Code. Section 142 provides that the complaint may contain a plain and concise statement of the facts constituting "a cause of action;" and by section 167, the plaintiff is authorized to *unite several causes of action* in the same complaint when they are of the same nature. How unite them? By mixing them up in one undistinguished and undistinguishable mass? Clearly not; reason forbids this. It needs not the results of centuries of experience to show us how inconvenient this would be. The Code sanctions nothing of the kind. It authorizes the statement of a "cause of action," that is, a *single* cause of action. No other construction is admissible. Hence if the plaintiff wishes to include in his complaint more than one cause of action, he must distinguish between them by the phrase, "And for a further cause of action the plaintiff complains," &c.; or some other equivalent words. If he fails to do this, every allegation which is not essential to a single cause of action, must, if objected to, be stricken out as redundant. In other words, the complaint, if it contains more than one cause of action, must be divided into distinct counts, like a declaration at common law. This is required, not only by the provisions of the Code itself, fairly construed, but by the paramount necessity of having issues which are to be tried by a jury, clearly and distinctly presented.

The burden of analyzing the complaint, and separating the causes of action which it may contain, is not to be thrown upon the court at the trial; nor is the defendant to be required to do this at his peril.

This shows that the plaintiff in this case is himself in fault in having united two causes of action in his complaint, without properly distinguishing between them. Had a motion to that effect been made, one of these would have been stricken out.

In regard to answers, the Code is still more explicit. Section 130, which authorizes a defendant to put in several defences,

provides that "they shall each be separately stated, and refer to the causes of action which they are intended to answer, in any manner by which they may be intelligibly distinguished."

This provision is not only conclusive to show that defences must be single; but goes to confirm the position I have taken in respect to the complaint. Unless the causes of action are distinguished in the complaint, how can they be referred to separately in the answer. It must be clear to every legal mind, upon deliberate reflection, that there can be no proper mode of framing a complaint or answer in a common law action, without distinguishing each separate cause of action, or defence, by at least some appropriate commencement if not conclusion.

The words "and for a further cause of action (or defence)," as the case may be, would probably be sufficient for the purpose.

This brings me to the consideration of one of the most intricate as well as interesting inquiries which can arise under the Code; that is, how and to what extent it has changed the rules of the common law in regard to the mode of stating defences.

In several of the common law actions it was necessary to plead specially, because they had no plea which would put in issue the whole declaration.

Under the Code, however, a defendant has only to answer, denying "each and every allegation of the complaint," to put the plaintiff upon the proof of every fact alleged by him. This form of answer, which seems to meet with general favor, is applicable to every species of action.

The Code in this respect, therefore, has produced a uniformity which did not before exist. But this general traverse is not equivalent in all cases to a plea of the general issue at common law; because under the latter a defendant was frequently permitted to give in evidence matters of defence which did not go directly to controvert any allegation in the declaration—as, for instance, infancy—accord and satisfaction, &c. But a general traverse, under the Code, authorizes the introduction of no evidence on the part of a defendant, except such as tends directly to disprove some fact alleged in the complaint.

The Code also allows a special traverse; but there is this difference between the special traverse of the Code and that of the

common law—the latter must always have been taken upon a single point—whereas now, the defendant may put in issue in one defence, as many of the allegations of the complaint as he chooses, leaving the residue unanswered. Under this species of traverse, as well as that which is general, the defendant may give any evidence whatever, which tends to disprove the allegations denied.

It results from this view that whenever an answer contains a traverse or denial of any one or more of the material allegations in the complaint, every thing else which it may contain, whatever it may be, is redundant, and must be stricken out on motion, unless it belongs to a separate and distinct defence. If it be a mere repetition of the denial in another form, then it is clearly redundant; but if it consist of other matter, it must still be stricken out, if it be pleaded as part of the same defence with the denial.

This is a plain consequence of the provision in section 150 of the Code, to which I have already alluded. But there is another conclusive reason for it.

Section 153 authorizes a plaintiff to demur to any defence which the defendant may interpose; not to part of a defence, or part of an answer; but to an entire "defence." No demurrer, however, will lie to an answer or defence which is composed in part of a denial of material allegations in the complaint.

Hence, if a defendant be permitted to insert new matter in the same defence with such a denial, he effectually precludes the plaintiff from all means of taking the judgment of the court as to the sufficiency of the new matter.

It is entirely clear, therefore, that every denial of the whole, or any material portion of a complaint must stand by itself as a separate and distinct defence and must be so pleaded. This is sufficient to show that many of the allegations objected to in the answer in this case must be stricken out.

But it is possible that that portion of the answer which states facts going to repel the allegation of malice, may be considered as intended to set up a separate and distinct defence, although this is not indicated by any appropriate phraseology.

It becomes necessary, therefore, to inquire what sort of defences



may be specially set forth, or pleaded, under the second subdivision of section 149 of the Code.

It will not be claimed, I suppose, that the Code has changed the essential nature of things. The statutes of reason are more permanent and immutable than those of the legislature.

Defences, then, are divisible into two classes:

1. Those which deny some material allegation on the part of the plaintiff;
2. Those which confess and avoid those allegations.

There can be no good defence which does not belong to one or the other of these classes. The Code, following the order of nature, has provided for both classes in section 149. By the common law these two kinds of defences had become more or less intermingled and confused; the Code keeps them distinct. I have already remarked that no defence which does not controvert any material allegation of the complaint, can be given in evidence under a general or special traverse. Every such defence, therefore, must be pleaded specially.

The counter question then arises: Is it admissible to set forth specially any defence which *may* be given in evidence under such a traverse?

The objections to this mode of stating such a defence are identical with those which existed at common law against special pleas amounting to the general issue.

It will seem therefore, to throw light upon the question, to look into the reasons why such pleas were held to be defective.

The reasons usually given in the books are, that they tended to needless prolixity, and referred matter to the court which was proper for the jury (*Bac. Ab. Pleas G. 3; Gould's Pl. part 2, ch. 6, § 79; Steven's on Pl. 422; Com. Dig. Pleader E. 13*).

These reasons have lost none of their force at the present day; especially that in regard to prolixity, as one main object of the Code was to simplify and *abridge* proceedings.

But there was a more conclusive reason than either of these, for the rule in question.

An issue joined upon such a plea would not necessarily determine the cause. If found for the defendant it would be decisive; but if for the plaintiff it determined nothing. A single familiar

instance will put this in a clear light. A, before the Code, sued me in trover for a horse, and I put in a plea that the horse, at the time of the alleged conversion, was my property, upon which the plaintiff took issue. If I maintained this issue, I made out a clear defence; but suppose upon the trial I had proved that the horse belonged to B, the issue must nevertheless have been found against me. Would the plaintiff therefore have been entitled to judgment? Clearly not. If he would, B might have sued me the next day for the horse and recovered upon the same evidence. A repleader was the remedy in such a case, if a verdict was found for the plaintiff.

The same consequences attended every special plea amounting to the general issue. That *this* and not their tendency to prolixity, was the true reason why such pleas were held bad, is evident from the nature and success of the expedients invented to obviate the difficulty.

The first of these was the special traverse, which consisted in merely appending to the plea a denial of the allegation in the declaration with which the matter of the plea conflicted. This was the origin of the *absque hoc* clause. This clause was held to make the plea good. But if prolixity was the objection, it is difficult to see how it was removed by converting the affirmative facts, which before were traversable, into mere matter of inducement which could not be traversed and need not be proved.

Such a plea was good, simply because it presented an issue which found either way, would be decisive of the cause.

This expedient however, although it cured the fault in the plea, did not effect the object generally in view; which was either to compel the plaintiff to admit some portion of the facts, and thus narrow the evidence, or to take the judgment of the court upon the sufficiency of the defence without going to the jury.

This led to another invention highly artificial but effectual; to wit, that of giving express color. This consisted merely in admitting upon the face of the plea a state of facts purely fictitious, which but for the facts stated in defence, would support the action. This of course cured the defect; because if the issue upon the special matter was found for the plaintiff, although that find-

ing would not of itself show him entitled to recover; still he would then have judgment upon the admitted facts; the answer to those facts having been overthrown by the verdict. This again demonstrates that this tendency to prolixity was not the real objection to pleas amounting to the general issue, because the addition to such a plea of a fictitious cause of action for the plaintiff would be an absurd remedy for such an evil.

The difficulty was this: It resulted from the very organization of the complex tribunal composed of court and jury; that the court could look only at the record in giving its judgment. The record, therefore, must show a right of recovery in the plaintiff, either found by the jury or admitted by the defendant; or a judgment for the plaintiff would be erroneous upon its face.

It is certain that a special plea, which amounted to the general issue, or in other words, which denied argumentatively any material facts alleged by the plaintiff, did not even impliedly admit facts enough to constitute a cause of action; and it is equally clear that an issue found for the plaintiff upon such a plea would not, for the reasons I have given, show him to have any. Hence such pleas were defective.

This subject might be further illustrated by reference to pleas giving implied color, as it was called, but I will not dwell longer upon it.

It may be thought by some, that all this reasoning about what are called the subtleties of common law pleading is unnecessary in construing the simple provisions of the Code. The Code has on this subject all the simplicity which exists in the nature of things, and can not well have more.

What particular subtlety is there about the rules of which I have been speaking? Can any thing be more palpable than these rules, as well as the reasons for them? And are they not just as applicable to judicial proceedings now as they ever were?

Is the court under the Code to render a judgment for a plaintiff, unless the right to that judgment results in law from the facts admitted by the defendant or found by the jury? Must not such a judgment be reversed upon the face of the record? No one can doubt it.

Again, a jury can determine nothing but the issue presented to

it. Upon an allegation, therefore, by the defendant, that he owned the property claimed in the suit, which allegation is denied by the plaintiff, the jury can not find by their verdict that the *plaintiff* owned it. Such a verdict would be foreign to the issue and must be set aside. It would be unworthy the jurisprudence of any enlightened country to admit of such looseness.

Upon a proper verdict therefore for the plaintiff, upon such an issue, no judgment whatever can be rendered, nor ever could with propriety; and an issue upon every plea, denying argumentatively any material allegation of the plaintiff, must be of this character.

The practical difficulty growing out of this necessary rule, was avoided at common law by such pleas being generally pleaded in connection with the general issue, a verdict upon which latter issue against the defendant, would entitle the plaintiff to judgment. But as the plea might be pleaded singly the rule was indispensable.

It is so still; unless we absolve courts from the necessity of looking exclusively at the record in giving their judgment; and permit them to dispose of cases in view of facts not there appearing; or unless we allow juries to find their verdicts according to their conceptions of the abstract rights of the parties, without regard to the issues presented to them.

Can any one fail to see that these rules, which circumscribe the power of juries, and limit the discretion of courts, constitute our most effectual guaranties for the faithful and regular administration of justice? And shall we then throw them away? There is no necessity for this. The Code does not require it. No such warfare between law and logic results from its provisions.

I hold it therefore to be incontrovertible that every special defence which consists of matter which goes to disprove any material allegation in the complaint is defective and must be stricken out on motion.

A doubt may be raised where the new matter is pleaded not in connection with a direct denial of any portion of the complaint, but as a separate defence, whether it can strictly be considered as *redundant*.

This question, however, is not of the slightest importance; be-



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cause the court at common law possessed the power to strike out these pleas on motion; and this was the appropriate mode of getting rid of them instead of by demurrer, for this plain reason, that a demurrer admitted the truth of the plea; and the facts contained in such a plea, if proved or admitted, must necessarily constitute a good defence.

To render judgment for a plaintiff, therefore, upon demurrer to such a plea, as was sometimes done when the demurrer was special, was incongruous, and not in accordance with the usual theory of pleading.

This common law right of striking out such pleas on motion, has never been taken away; and the effect of the Code is to restore to us this ancient and simple practice which prevailed in early days in the common law courts.

It follows from this reasoning that all and every portion of the answer in this case except the direct denials of the allegations in the complaint are defective and redundant and must be stricken out. No costs are allowed as it is an unsettled question.

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## SUPREME COURT.

FLYNN agt. THE HUDSON RIVER RAIL ROAD COMPANY.

A suit can not be legally commenced against a Rail Road Corporation (for loss of baggage or any thing else) by the service of a summons upon a "*baggage master*" in their employ. He is not such a "managing agent" as the statute contemplates. But a *general appearance*, waives the irregularity of such a service.

An action against a common carrier, under the Code, sounds in tort; and an application to the court for judgment under the second subdivision of § 246 must be made, where judgment is taken for want of an answer.

*Albany Special Term, December 1851. Motion to set aside judgment, &c., for irregularity.* The action was brought to recover the value of a carpet bag and its contents, alleged to have been lost by one Sullivan, a passenger on the defendants' road. The summons is in the usual form with a notice that upon

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the defendants' failure to answer, the plaintiff will take judgment for \$150 and interest. The summons was served upon one Hotchkiss, a "managing agent" of the defendants, having charge of the baggage department at their depot at East Albany, on the 17th of November 1851. The next day the defendants' attorney served a notice of appearance, but omitted to demand a copy of the complaint, none having been served with the summons. The plaintiff afterwards filed his complaint, in which he alleged that Sullivan, having taken and paid for his passage from East Albany to Schodack, delivered his carpet bag with its contents to the defendants, which they put into their baggage car, and engaged to deliver to Sullivan upon the arrival of the train at Schodack; that they landed him there, but did not deliver his baggage, as they had agreed to do, but on the contrary, had lost it; whereupon they became liable to pay him the value of the carpet bag and its contents. The complaint also alleges the assignment of the claim by Sullivan to the plaintiff. On the 11th of December the plaintiff, for want of an answer, perfected a judgment for \$158.99.

E. J. SHERMAN, *for Plaintiff.*

J. H. REYNOLDS, *for Defendants.*

HARRIS, Justice.—It is very clear that the service of the summons upon Hotchkiss was not a sufficient commencement of the suit. He was not such a "managing agent" as the legislature intended, when it authorized the summons to be served on a person holding that relation to the corporation. To authorize such a service, the agent must have the same general supervision and control of the general interests of the corporation that are usually associated with the office of cashier or secretary. It was never intended that a rail road corporation might be sued by serving process upon a *baggage master*. But this irregularity, or want of legal service, has been cured by the general notice of appearance served by the defendants. They thereby admitted themselves to be "*regularly in court*" (Dix agt. Palmer, 5 *How. Pr. R.* 233).

But the defendants insist that the plaintiff could not regularly perfect his judgment without application to the court. I think

they are right in this position. Under the common law practice the plaintiff might bring his action against a common carrier, either in assumpsit, or upon the case. In the one case, it was founded upon the promise which the law implies to perform a duty; in the other, upon the injury resulting from a breach of duty. In either case, the real gravamen of the action was the negligence or misfeasance of the carrier in the performance of his duty. I admit that there is some difficulty in defining the exact boundary between "actions on contract for the recovery of money," embraced in the first subdivision of the 246th section of the Code, and the "other actions" to which the second subdivision applies. There are some actions which are, in their *form*, clearly actions on contract, and are brought for the recovery of money, and yet are, in their nature and character, actions sounding in damages. Such is the action for breach of promise of marriage. On a former occasion, I felt constrained to hold that the provisions of the first subdivision above mentioned, were applicable to such an action. I confess I have never felt quite satisfied with that decision (*Williams vs. Miller*, 4 *Howard*, 94). The same view had previously been taken by the New York Common Pleas in *Leopold vs. Poppenheimer* (1 *Code Rep.* 39). Although these cases seem too plainly within the language of the first subdivision to allow an escape, yet I should not regret to see them reexamined and disapproved. The rule ought to be, that when the action is brought for the recovery of a *money demand*, or a *sum certain*, judgment may be perfected without application to the court; but in all other cases such application should be required.

In relation to actions against common carriers, I concur in the views expressed by Mr. Justice Johnson, in *Clor vs. Mallory* (1 *Code R.* 126). Though a contract, express or implied, may be involved in the action, it is really founded upon the negligence or misfeasance of the carrier. It was so regarded under the former practice. When interest might be collected only upon a judgment recovered in an action upon contract, it was not allowable to collect it upon a judgment against a common carrier, even though the declaration had been assumpsit in form. It was so held, upon the ground that whatever the form of the action, it

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was, in truth, an action on the case (2 R. S. 364, § 9). In *McDuffie vs. Beddoe* (7 Hill, 578), a party, who had purchased a stock of goods at cost prices, had paid for them at the price at which they had been inventoried. Afterwards he filed his bill, alleging that the inventory price exceeded the contract price, and that he had thus been defrauded by the vendor. It was held that this was not an action founded upon contract, although to maintain it, it was necessary to allege and establish an express contract. Fraud was the gravamen of the complaint, and the party against whom judgment was recovered, was held to be liable to imprisonment on that account.

Although an action against a common carrier did, at common law, possess the *amphibious* character to which I have referred, being made either an action *ex contractu*, or *ex delicto*, at the option of the pleader, I am unwilling to admit that it has brought that feature with it into the new system. I think it bears more resemblance to the family of torts than to contracts, and that it ought not to be allowed any of the exclusive privileges that pertain to the latter. I shall hold, therefore, that the plaintiff was irregular in perfecting his judgment, without application to the court. This decision will render it necessary for the plaintiff to amend his summons so as to make it conform to the *second* subdivision of the 129th section, instead of the *first*. This he may be permitted to do, within twenty days; and he must also, within the same time, serve upon the defendants' attorney a copy of his complaint. The defendants are to have the usual time to answer or demur after the service of the complaint. Neither party is to have costs upon this motion.

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NOTE.—*Mitchell agt. Westervelt*, reported *ante* page 265, was affirmed, on appeal at the last January general term at Ballston—WILLARD, HAND, CADY and ALLEN, Justices.



## SUPREME COURT.

SEWARD agt. MILLER AND MILLER.

An answer denying *in terms*, specifically, each material allegation of the complaint, without particularizing the allegations, is in effect a general denial, and is therefore insufficient.

It is not, however, sham or irrelevant, and can not be stricken out on motion. Where a motion is made to strike out an answer as sham and irrelevant (*Code* 1851, § 152), and it is neither, but insufficient on other grounds, the defendant will be allowed to demur, although the time for serving a demurrer may have expired.

*Westchester Special Term, February 1852.* This is an action against the maker and endorser of a promissory note. The complaint is in the usual form. The answer professes to deny specifically each and every material allegation of the complaint, but does not particularize any allegation. The plaintiff moves to strike it out as a sham and irrelevant answer, or defence, under the 152d section of the Code of 1851.

S. B. STRONG, Justice.—By the 149th section of that Code an answer must contain a *specific* denial of *each* material allegation of the complaint controverted by the defendant. It has been contended in behalf of the defendant in this case, that a denial in the words of the statute is sufficient. It might have been so under the corresponding section of the Code of 1849, where the word “general” was used to qualify the denial. It was so difficult, however, to ascertain what was meant by the terms *general* denial of *each* allegation, that the decisions upon that provision of the Code, while it was in operation, were by no means uniform. It was, probably, with a view to settle the difficulty resulting from the phraseology of this part of the Code of 1849, and in a manner corresponding with the original design of its framers, that the word *general* was omitted in the existing Code. The denial must now be specific of each controverted allegation. It can not be specific without mentioning by some particular mark of distinction the allegation which it is designed to controvert. Specification, according to Walker, consists in “distinct notation, determination by a particular mark of distinction, particular mention.” In this case there

is neither. It is important in every case that the defendant should specify which of the allegations he deems material and intends to controvert, in order that the plaintiff may clearly know what is denied, and what it may be necessary for him to prove. It is peculiarly so, for many reasons, where the defendant is required to swear to his answer. The denial in this case, although verbally specific, is in effect general, and therefore the answer is not warranted by the Code.

But although the pleading interposed by the defendant in this cause was not warranted by the existing Code, and may, therefore be deemed insufficient, it does not necessarily follow that it is a sham or irrelevant answer. The 152d section, while authorizing the court to strike out sham and irrelevant answers, contains no definition of either of those characteristic terms, nor is there any in the other multitudinous provisions of the Code. They mean now precisely what they did before, and no more.

The word "sham," as defined by lexicographers, means "false, counterfeit, or pretended." It has received the same interpretation when applied to pleadings (1 *Chitty on Pl.* 574; and 2 *Bouvier* 375). These authorities are cited with approbation, and the definition adopted by my lamented friend, the late Judge SILL, in his able opinion in *Darrow agt. Miller* (5 *How. Pr. R.* 247). According to those authorities, a sham pleading is one known by the party to be false, and put in for the purpose of delay, or other unworthy object. Judge SILL was inclined to extend the term to such pleadings as may be true in point of fact, but are so impertinent or so *grossly frivolous* that the court can not but see that the object is to *delay* or *perplex* the plaintiff, instead of presenting a defence. It is not material in this case to consider whether the pleading thus characterized by that learned judge would not be rather frivolous than sham, between which, and the appropriate remedies for each, the Code makes a distinction (§ 152, 247). There is nothing in this case to show that the answer is false, or that the defendants' object in interposing it was to delay or perplex the plaintiff.

A pleading is irrelevant which has no substantial relation to the controversy between the parties to the suit. The word irrelevant is comparatively of modern introduction in England.

It is used in parliamentary debate in that country to signify "unassisting, unrelieving," which are in accordance with the etymology of the word. But in Scotland, according to Mr. Elphinstone, it has been for a considerable period a jurisprudential word, and is there used in the same sense as the more appropriate word *irrelative*. It has, I believe, uniformly received the same interpretation in the courts in this country, where it has been very generally used. Now, a general denial by one party of a material allegation of his opponent, can not be considered as *irrelative* to their controversy, although it may be informal, or even unavailable by reason of some statutory restriction.

Neither do I think that the answer in question is frivolous. The rule before the adoption of the Code was that a pleading was not frivolous unless the defect was radical and so palpable that no serious argument could be advanced in its support. I am aware that there has been decisions, since the adoption of the Code, that pleadings are frivolous where there is a departure from any requisite which it may prescribe, even in particulars where the construction of the terms may be difficult. But I prefer, and until I may be authoritatively overruled, shall adhere to the old rule. In cases where there can be no reasonable doubt of the invalidity of a pleading in either of the attributes mentioned in the 152d and 247th sections, there should be no hesitation in awarding to the opposite party the summary redress for which they provide. But in all cases of doubt, or where the insufficiency is from any other cause, the party objecting to it should resort to a demurrer, when the point may be more deliberately considered and satisfactorily settled.

The motion to strike out the answer is denied; but as that pleading is defective, I shall not give the defendant costs; and I shall allow the plaintiff to demur, should he be so advised, in ten days

## SUPREME COURT.

## MASTEN agt. SCOVILL.

The true criterion for issuing an execution against the *person* of a defendant after judgment, is this: *Could the defendant have been arrested before judgment*, under the provisions of the chapter relating to arrest and bail.

Not whether an order of arrest has been actually obtained before judgment, nor whether the pleadings show a statement of facts upon which he might be arrested.

By the Code, the practice is intended to be left as formerly in this respect; that is, a party obtaining judgment must determine for himself whether under the existing provisions of law he can safely arrest the defendant on final process or not. Neither party is concluded by an order of arrest or a statement in the pleadings.

An action may, in form, appear from the pleadings *ex contractu* entirely, when in its very essence and gravamen it is *ex delicto*, sounding altogether in tort. As, for instance, an action against a common carrier, and for a breach of marriage promise, &c. (see *Flynn agt. The Hudson River Rail Road Company*, ante page 308).

(It will be seen that this case concurs with *Cheney agt. Garbutt*, 5 How. Pr. R. 467, and differs very materially from *Gridley agt. Macumber*, id. 414, and *Corwin agt. Freeland*, ante page, 241).

*Albany Special Term, December, 1851. Motion to set aside execution against the defendant's person.* The complaint states that the plaintiff had purchased of the defendant a horse for which he had paid \$150, in consideration of which the defendant warranted that the horse was sound, &c.; that the defendant further represented that he had long been acquainted with the horse, and knew all about him, and knew him to be sound, &c. It is then alleged that the horse was, in fact, unsound, and that this was known to the defendant and fraudulently concealed from the plaintiff at the time of the sale. The answer denies these allegations.

The cause was tried by the court. From the decision which forms a part of the record, it appears that it was proved upon the trial that, upon the sale, the defendant fraudulently represented the horse to be sound, whereas he knew him to be unsound, and fraudulently concealed the fact from the plaintiff. Judgment having been perfected for \$151.37, an execution was issued



against the property of the defendant to the sheriff of Washington, and returned unsatisfied. An execution against the person of the defendant was then issued to the same sheriff. This execution the defendant moves to set aside.

J. K. PORTER, *for Plaintiff*.

J. POTTER, *for Defendant*.

HARRIS, Justice.—As I understand the 288th section of the Code, an execution against the person of a judgment debtor may be issued in any case in which the defendant might, before judgment, have been arrested under the provisions of the chapter relating to arrest and bail. Whether an order for the arrest of the defendant had, in fact, been obtained, is wholly immaterial. The criterion is the right to such an order. Upon this point I am unable to concur in the views of Mr. Justice EDMONDS, as expressed in *Squire vs. Flynn* (8 Barb. 169). That learned judge admits that the language of the section is broad enough to authorize an arrest upon final process, where no order to arrest had been obtained; yet he thinks that in actions upon contract, the right to arrest the defendant upon execution should be restricted to cases in which, before judgment, such right has been determined, upon application for an order. I find nothing in this section which justifies this restricted construction. On the contrary, it is declared that whatever the action, whether founded upon a contract or a wrong, if it be an action which, under the provisions of the 179th and 181st sections of the Code, would have entitled the plaintiff to an order for the defendant's arrest, an execution against the person may be issued after judgment, whether the order had been obtained before judgment or not. The criterion is not, whether in any case an order had been obtained, but, in every case, it is whether it might have been obtained.

Nor can I concur in the opinion expressed by Mr. Justice Hubbard in *Gridley agt. Macumber* (5 Howard 414), that the complaint should always show that the defendant is liable to arrest. I think it is shown conclusively by Mr. Justice Welles, in *Cheney agt. Garbutt* (5 Howard, 467), that it was never intended that the facts which rendered the defendant liable to arrest, except so

far as they may be involved in a statement of the cause of action itself, should be set forth in the complaint; should any matter, not pertinent to the cause of action, be inserted in the complaint, merely to show that the defendant is liable to arrest, as, for example, that the defendant had removed or was about to remove his property with intent to defraud his creditors, I can see no reason why it would not be treated as redundant or irrelevant.

It has been said that such a construction "would be, virtually, repealing the act to abolish imprisonment for debt, so far as final process is concerned" (*Squire vs. Flynn*, above cited). But I can not admit the soundness of this argument. Before the Code, as well as since, a party who had recovered judgment, might, at his peril, issue execution against the person of his debtor, in any case, notwithstanding the prohibitions of the act to abolish imprisonment for debt. It was for the plaintiff in the judgment to determine in the first instance, whether he had a case which would authorize the imprisonment of his debtor. If he erred, the court, upon application, would set aside the process, or perhaps, without waiting for this, the party imprisoned might bring his action for an illegal arrest. At any rate, the consequences of such illegal arrest were, and still are, sufficiently serious to secure at least a reasonable degree of caution in the issuing of such process. I think the framers of the Code intended to leave the practice, in this respect, where they found it, and to allow the party obtaining a judgment, to determine for himself whether under the existing provisions of law the defendant may safely be arrested. In determining this question, neither party is concluded either by an order of arrest, or the statements in the pleadings. The true office of the order of arrest is well stated by Mr. Justice Hubbard in the case already noticed, and the relation of the pleadings to this question is equally well stated in *Cheney vs. Garbutt*.

The question, therefore, in this, as in every other case, is, whether upon the principles prescribed in the 179th section of the Code, the defendant "might have been arrested." For this purpose, the facts as they appear upon the motion are material. If they establish a case which would have sustained an order of arrest before judgment, they will also sustain an execution against the person after judgment. Taking this rule for our guide, there

is little difficulty in determining the question now in hand. Like the action against a common carrier, the plaintiff's case, as presented in his complaint, would have sustained, at common law, an action upon the contract or in case for the fraud (see *Burkle vs. Ellis*, 4 *Howard*, 288; *Flynn* agt. the Hudson River Rail Road Company, *ante* 308). But the gravamen of the plaintiff's case, as stated in his complaint, and still more decidedly as established upon the trial, was the fraudulent misrepresentations of the defendant on the sale of the horse. It will not be denied that in such a case the defendant might have been held to bail before judgment. If so, we have seen that he is also liable to arrest upon final process. The motion must, therefore, be denied, but without costs.

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### SUPREME COURT.

SHERMAN AND WIFE, Appellants, agt. YOUNGS AND OTHERS, Admr's, &c., Respondents.

The costs on appeal from a surrogate's decree, are not regulated by the Code; they must be taxed according to the fee bill in force immediately previous to the 1st July 1848.

By § 471, *all* proceedings upon appeals from Surrogates' Courts, are entirely excluded from the operation of any of the provisions in the Code; they must be governed by other statutes.

*At Chambers, December 1851. Taxation of Costs.* This was an appeal from a decree of the surrogate of Yates county on final settlement. The decree of the surrogate was reversed at the last Monroe general term, with costs, and the appellants' attorney now presents his bill of costs in items, according to the fee bill as it existed prior to the first Monday in July in 1848, for taxation. The respondents' counsel appears, and objects to the power of a justice of this court to tax the costs, and to the right of the appellant to recover costs, except according to title X, part 2d of the Code.

E. VAN BUREN, *for the Appellants.*

J. V. VAN ALLEN, *for the Respondents.*

WELLES, Justice.—Section 303 of the Code repeals all statutes establishing or regulating the costs or fees of attorneys, &c., in *civil actions*, &c., but allows the prevailing party, upon the judgment, certain sums by way of indemnity for his expenses in the action; which allowances are afterwards specified. Section 318 provides that “when the decision of a court of inferior jurisdiction in a special proceeding shall be brought before the Supreme Court for review, such proceeding shall, for all purposes of costs, be deemed an issue, on a question of law, from the time the same shall be brought into the Supreme Court, and costs thereon shall be awarded and collected in such manner as the court shall direct, according to the nature of the case.”

Whether, therefore, the appeal in this case is to be regarded an action, or a special proceeding under section 2, is immaterial, as the foregoing sections are sufficiently comprehensive to provide for the case of an appeal from a Surrogate's Court; and are decisive of the question, unless they are limited and controlled in their operation by § 471, which declares that “until the legislature shall otherwise provide, this act shall not affect proceedings upon mandamus, or prohibition; nor appeals from Surrogate's Courts,” &c. &c.

The counsel for the respondents insists that the section last referred to must be read in the same manner as if the words were, “this act shall not affect proceedings upon mandamus, or prohibition; nor proceedings on appeals from Surrogates' Courts,” &c.; and argues that the word proceedings, as applied to appeals from Surrogates' Courts, refers only to the several consecutive steps to be taken from the commencement to the conclusion of the appeal; such as the notice of the appeal, giving the bond, the surrogate's return, petition of appeal, &c. &c.; and that the making out and taxing or adjustment of the costs, and the judgment of the court allowing them, are no part of such proceedings.

My opinion, however, is that § 471 will not allow of the reading and interpretation of the respondents' counsel. I think its object and intention was to exclude entirely from the operation of any of the provisions of the Code, appeals from Surrogates' Courts, including all the proceedings therein, with the judgment of the appellate court and the proceedings to enforce it; and to leave



the subject throughout to be governed by other statutes, in force at the time the Code took effect.

It follows, therefore, that the costs in this case are not regulated by the Code, but must be taxed according to the fee bill in force immediately previous to the first Monday of July 1848, which remains, *quoad hoc*, the law.

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### COURT OF APPEALS.

BROWN, Appellant, agt. BROWN AND OTHERS, Respondents.

This court has no jurisdiction of a suit commenced before a justice of the peace and discontinued by reason of title interposed; and a suit for the same cause of action commenced in the (late) Common Pleas, or (now) Supreme Court, and appealed to this court.

*December Term, 1851.* This was an action of trespass originating in a Justice's Court. The defendants interposed a plea of title, to the land in question; thereupon the action was discontinued, and a suit for the same cause of action commenced in the old Court of Common Pleas; and by operation of law was transferred to and vested in the present Supreme Court, and was there finally decided in favor of the defendants. The plaintiff appealed to this court.

The cause was on the calendar at the last September term (1851), and brought on to argument.

HORATIO BALLARD, counsel for respondents, raised and argued a preliminary objection to the jurisdiction of the court, on the ground that the action was, in fact, *a mere continuation* of the suit before the justice; that *the pleadings*, and many other things as they occurred before the justice, governed the suit throughout.

GEORGE F. COMSTOCK, *Contra*.

The court took the case (after argument of this question) and held it under advisement until December term, when they dismissed the appeal with costs on the question of jurisdiction (*Code*, § 11, *sub. 2*).

## SUPREME COURT.

SNYDER agt. WHITE.

An answer denying "knowledge or information sufficient to form a belief" of a material fact alleged in the complaint, forms a good issue, upon which the plaintiff holds the affirmative; and which gives to the defendant, on the trial, all the benefits of introducing proof which he would have on a positive denial. The Code makes no difference whether the proceedings are verified or not. (*This agrees with the Genesee Mutual Ins. Co. agt. Moynihan*, 5 How. Pr. R. 321).

An amended answer which, though in form and phraseology, different from the original, but in its *legal effect*, amounting to the same thing, will be stricken out on motion.

*It seems*, that after issue, notice of trial, and an examination of a witness under § 391 of the Code, the defendant can not amend his answer, without application to the court.

The decision of a *motion* is never regarded in the light of *res adjudicata*. As a matter of settled practice, however, it can not be renewed on the same or additional facts, without leave of the court.

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*Monroe Special Term and Circuit, November 1851. Motion to strike out amended answer.* The action is on two promissory notes, made by the defendant, dated August 22d 1848, payable to Richard Lusk and Charles Toll, assignees of D. C. Lusk & Co. or bearer; one for \$100, payable July 1st, 1850, and interest annually; the other for \$90.21, payable to the same persons, September 1st 1850. The complaint was verified January 27th, 1851, and alleges that the notes were duly transferred to the plaintiff, and that he is the holder and owner thereof.

The defendant put in an answer which was verified July 26th, 1851, in which the making of the notes was admitted; that as to the transfer of the notes to the plaintiff, and as to his being the holder and owner of them, the answer stated that the defendant had no knowledge or information sufficient to form a belief. It also set up the defence that the defendant was an infant at the time of the execution of the notes.

On the 30th August 1851, the plaintiff put in a reply, alleging a new promise after the defendant became twenty-one years of age, and on the same day the action was noticed for trial by the

plaintiff's attorney. On the 13th of September following, the defendant examined the plaintiff as a witness, before the county judge of Wayne county, in relation to matters involved in the issue under § 391 of the Code; after which, and before the circuit at which the action was noticed for trial, and about the 15th of September 1851, the defendant's attorney served the plaintiff's attorney with an amended answer, admitting, as in the first answer, the execution of the notes, and in like manner denying knowledge or information, sufficient to form a belief, as to whether the notes had been transferred to the plaintiff, or whether he was the holder or owner thereof. It also set up the defence of infancy as before. It then set forth in substance, as a further answer to the complaint, the following matters, viz: that the payees of the notes were still the owners thereof as assignees of Dewitt C. Lusk & Co. and that all transfers of them by the payees or any other person, were colorable merely and made with a view of placing the notes beyond the reach of the creditors of D. C. Lusk & Co. and of hindering, delaying and defrauding the creditors of the latter, of whom the defendant was one. That there had been in form a transfer of the notes to the plaintiff by one William Vangorder, which was colorable merely, passing no title to the plaintiff; and that the only right, title or interest of the plaintiff to the notes is from or through such or some other merely colorable transfer, and which was made after the notes were due; that Vangorder, or the person making any transfer of said notes to the plaintiff, had no title thereto or authority to make such transfer, or any interest in said notes. That said notes at the time they were executed, constituted a portion of a fund in the hands of said payees, for the payment of the creditors of D. C. Lusk & Co. and at the same time the defendant was, and continued to be one of their creditors, having an interest in said fund; and that the plaintiff, or any previous holder or owner of said notes, was not and had not been a purchaser thereof in good faith, or for a valuable consideration.

The foregoing are the facts shown by the plaintiff, upon which he moves to strike out the amended answer for irregularity, on the ground that after the defendant examined the plaintiff as a witness, he had no right to amend his answer, and also on the

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Snyder agt. White.

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ground that the amended answer is identical in legal effect with the original answer.

On the part of the defendant it is shown, among other things, that the examination of the plaintiff before the county judge was had with the view solely to the discovery of new facts not in issue at the time of the examination. That at the Wayne circuit, held on the 21st day of October 1851, a motion was made in behalf of the defendant to strike the cause from the calendar, on which it had been placed pursuant to the notice of trial before mentioned. That such motion was based solely upon the ground of the regularity of the amended answer, and of there having been no reply thereto. That the motion was resisted by plaintiff's counsel, on the ground among others, that the defendant had examined the plaintiff as a witness, before the county judge, after issue joined upon the original pleadings, and that the amended answer was the same in legal effect as the original. That the circuit judge granted the motion, and struck the cause from the calendar, exclusively upon the grounds upon which the motion was based. It also appeared that after receiving the amended answer, and on the 17th September, aforesaid, the plaintiff's attorneys served upon the defendant's attorney a notice that they declined receiving the amended answer, for the same reasons (specifying them) as those for which this motion is now made. On the 21st October the defendant's attorney gave a stipulation, allowing the plaintiff's attorneys twenty days to reply or demur to the amended answer, or to move the court for leave to amend or strike out the amended answer, or any part thereof. This motion is made within the twenty days allowed by the stipulation for that purpose.

J. C. SMITH. *for the Plaintiff.*

WM. PORTER, *for the Defendant.*

WELLES, Justice.—The motion to strike out the amended answer must be granted. I agree with the plaintiff's counsel, that it is identical, in legal effect, with the original answer. The issue upon the question of the transfer to and ownership by the plaintiff of the notes upon which the action is brought, was well and sufficiently formed by the first answer. In the case of the



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Genesee Mutual Insurance Co. agt. Moynihen (5 *How. Pr. R.* 321), I held that an answer to a material fact stated in the complaint, denying sufficient knowledge or information thereof to form a belief, made a good issue, upon which the plaintiff held the affirmative, and which it was incumbent upon him to prove. Subsequent reflection has confirmed me in the correctness of that decision. This form of an answer is given by section 149 of the Code, and is a mode of denial, where the party is ignorant of the fact alleged, and can not safely deny the allegation, and is not bound to admit it, either in terms, or by omitting to answer. It is peculiarly proper, under such circumstances, where the pleading, as in the present case, is required to be verified. The Code, however, makes no distinction in this respect, whether it is, or is not verified.

If, then, an issue is formed by such a denial, it only remains to be determined by the proof, whether the fact thus put in issue, is or is not true; and there can be no doubt, I think, but that the party thus pleading, would have all the benefit upon the trial, and the same right to introduce evidence, that he would have in case the fact had been directly and positively denied. Otherwise, it seems to me, there would be no use or meaning in the section giving this form of denial. The original answer in this case, put directly in issue the facts of the transfer of the notes to the plaintiff, and the ownership of them by him. The amended answer, in so far as it differs from it in language and form, does no more; unless it is in the allegation that the defendant is one of the creditors of D. C. Lusk & Co., and that I regard as totally immaterial. Upon the facts set up in the alleged new matter of the amended answer, it can not be denied that the defendant is liable to pay the whole amount of the notes, upon the assumption that he is a creditor of D. C. Lusk & Co. He clearly could not, in an action by the payees, set off, or recoup, any claim he has against them, even if he had, in his answer, claimed such set off, or right to recoup, which he has not done. According to the case made by the answer, the defendant is bound to pay the notes; after paying them, he might come in for a dividend of the trust fund. Admitting the payees have transferred the notes, either with or without consideration, so as to have lost their claim upon their

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Snyder agt. White.

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proceeds, or have received the full amount on a sale and transfer of them, the most that can be said is, that they are liable to account for the amount of them to the *cestui que trust*. That would, of course, be the extent of their liability in relation to the notes, in case the defendant had paid them to the payees. It seems clear, therefore, that the allegation, that the defendant is one of the creditors of D. Lusk & Co. does not strengthen the answer, or vary its legal effect as a defence in this action; and the sum and substance of that part of the amended answer, is that the plaintiff has not sufficient title to the notes to enable him to sustain the action upon them. As before shown, a good and perfect issue was formed upon that question by the original answer.

As the foregoing views dispose of the motion, it is not necessary to consider the question of the regularity of the defendant in amending his answer after the examination of the plaintiff before the county judge. If it were necessary, I should have no hesitation in saying that the defendant had no right to amend of course, under § 172 of the Code. Issue had been joined, the action noticed for trial, and the taking of proofs commenced under § 391. He could only amend, after that, by leave of the court. The object and meaning of that section was to enable the party to examine his adversary as a witness, for the purpose of using the evidence upon the trial of the issue; and it does not lie with the defendant, now to allege that he procured the examination to be had for any other purpose.

Under the liberal powers lodged in the court, in relation to amendments, the defendant would probably be allowed to amend his answer in this case, on application to the court, and upon terms, provided such amendment was shown to be necessary.

I do not regard the decision of the circuit court, in striking the cause from the calendar at the Wayne circuit, as at all in the way of the present application. The decision of a motion is never regarded in the light of *res adjudicata*, although, as a matter of orderly practice, the court will not usually allow a motion, once made and decided, to be renewed on the same facts, nor upon additional facts, without leave first obtained. But this is not that case. Various good reasons might have existed for striking the case from the calendar, which should have no

influence upon this motion; and this court can not now listen to representations of counsel, as to the reasons which, in fact, governed the circuit court in making its decision. It is sufficient that the motion was entirely different in its nature and object, from the present one, and the object now sought by the plaintiff could not regularly have been attained on the defendant's motion to strike from the calendar.

The motion to strike out the amended answer is granted, with ten dollars costs.

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## SUPREME COURT.

MONTGOMERY agt. ELLIS.

A party who has a judgment *in his favor*, may, on application to the court, under § 174 of the Code, have redress, or be relieved, the same as though judgment was *against* him. He comes within the spirit and meaning of that section, although not within its letter.

A *verbal agreement* between the attorneys for the respective parties to a pending suit, that judgment may pass for one of the parties with a certain amount of costs, supposed by them to be equivalent to certain claims relinquished by the opposite party, with relief from the litigation, is in effect a *compromise of a litigated suit*; and is final and conclusive between the parties, no fraud being shown, even though entered into under a mistake of law.

The courts have determined that the rule requiring stipulations or agreements of this kind to be in writing, does not apply, where the party has been led to *rely* upon them. And especially where they have been *executed* by passing into a judgment.

*Oneida Special Term, December 1851. Motion to modify or vacate a judgment under section 174 of the Code.* This cause (which was an action under the Code for the delivery of personal property) was noticed and brought to trial in December 1850, and the plaintiff not appearing, the defendant took judgment for a dismissal of the complaint; which judgment was perfected on the fourth of January 1851, for five dollars costs, against the plaintiff. He now moves under the provisions contained in section 174 of the Code of procedure, either to modify the judgment by adding a provision that the defendant have a return of the

property, or damages in lieu thereof; or to open the judgment altogether, so as to allow the plaintiff to try the issues in the cause. This relief is claimed, on the ground that the error of thus taking judgment, arose from a mistake, or inadvertence of the counsel of the defendant, and an anticipated difficulty, in recovering the property, or the value thereof, against either the sheriff or the sureties, on their undertaking.

T. H. FLANDRAU, *for the Motion.*

H. DENIO and W. O. MERRILL, *Opposed.*

GRIDLEY, Justice.—The plaintiff resists this application on the ground that in as much as this judgment is *in favor* of the defendant, he is not within the purview of the section, which only authorizes the court to relieve a party *against whom* a judgment has been taken within one year after notice of the judgment. It may be admitted that the defendant is not within the *words* of the act; but he is obviously within its meaning and spirit; and as the act is *remedial* in its nature and object, it should receive a liberal interpretation. Besides, I am of the opinion, it was the intention of the legislature merely to declare the law as it before existed (see 2 R. S. 359, § 3; Barheydt ads. Adams, 1 Wend. 101; Soulden vs. Cook, 4 Wend. 217).

2. The application is also resisted on the following state of facts, which are established by several affidavits. That before the cause was brought on for trial, a verbal agreement had been entered into between the attorney for the plaintiff and one of the attorneys of the defendant, that just such a judgment as that actually entered, should be taken at the circuit; and that the plaintiff's attorney should not appear on the trial, and that the defendant's costs should be limited to five dollars. The property in dispute was a canal boat, which the plaintiff claimed title to, as a purchaser on an execution. The defendant in his answer claimed title under a chattel mortgage, executed by a prior owner. The reply set up fraud in the mortgage, and that it conferred no title. The attorney of the plaintiff swears that he told the defendant's attorney that it would cost the plaintiff a considerable sum to prepare for trial; and though he could do so, and beat the defendant, yet as the plaintiff had got the boat, he would ad-



wise his client to allow the complaint to be dismissed, with five dollars costs, if the defendant would consent to take such a judgment. That the defendant's attorney agreed to the terms; and on noticing the cause for trial appended a stipulation to the notice, that on entering judgment for the defendant in the cause, the costs of the defendant should be limited to five dollars. This agreement was afterwards communicated to the plaintiff, and under the advice of his attorney he made no preparations for the trial, relying on the agreement which was actually carried out at the trial. Now, this agreement is stated in the affidavit of the defendant's attorney in much greater detail than it is given here, and is confirmed by the affidavit of another witness who was present, and heard the agreement; and by the affidavit of the plaintiff, as to his acceptance of the advice of his attorney and his reliance upon it, and omitting for that reason, to make any preparation for the trial of the cause. The counsel of the defendant claims the right to repudiate this agreement, as not being in writing, pursuant to the rules of court. To the right to repudiate there are two objections:

1. The courts have determined that the rule is not applicable to a case where a party has been led to *rely on* the stipulation, as the plaintiff did here, and allowed judgment to be entered against him. The ordinary doctrine of *estoppel in pais* would require the party who obtained the judgment by virtue of the stipulation, to abide by it afterwards (see 6 *Cow.* 385; 8 *Cow.* 119; 1 *Hill*, 627).

2. The agreement has been *executed* and has *passed* into a *judgment* and is now *verified* by the judgment, as well as rendered probable by the stipulation attached to the notice of trial. The defendant took such judgment, as he desired to do; and he can not vacate his own act, when it was done under an agreement on which the other party *relied*, and forbore to question on the trial the validity of the defendant's mortgage.

Now, regarding this agreement as valid, as I am bound to do, it was no less than a *compromise of a litigated suit*, executed and carried into judgment; by which the plaintiff gave up his claim of proving the defendant's mortgage fraudulent and void, and suffered a judgment of five dollars costs to pass against him;

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Temple agt. Murray and Ely.

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and the defendant gave up his right to a judgment for a return of the property, or damages in lieu thereof. This disposition of the suit must be deemed final and conclusive, there being no fraud charged in relation to the agreement. The most favorable aspect of the case is, that it was an agreement entered into under a *mistake of law*, as to the effect of a judgment like this, in a suit of replevin. If the counsel supposed that the judgment would be such as to enable the defendant to recover against the sureties or the sheriff (without official misconduct), he was mistaken. He must have a judgment for a return, or for damages in lieu thereof, before the condition of the obligation is broken (*Code* § 209, 277; 10 *Wend.* 333; 12 *id.* 120). A mistake as to the legal construction of a security is no ground, even in equity, for rescinding it. This was expressly decided in *Hunt vs. Rousmaniere* (1 *Peters*, 13 to 17; 8 *Wheaton*, 211, 212). This is a case to which the maxim *Ignorantia juris non excusat*, has been held to apply.

The motion must be denied with costs.

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## SUPREME COURT.

TEMPLE agt. MURRAY & ELY.

A complaint (verified) containing an allegation that the plaintiff is "now the lawful owner and holder of said note;" and the answer alleges (under oath) that the defendant "has not sufficient knowledge or information to form a belief as to whether the plaintiff is now the lawful owner and holder of said note, therefore can not admit or deny the same," forms an issue (of a denial legally) which requires the plaintiff to prove his ownership of the note on the trial (*see Genesee Mutual Ins. Co. agt. Moynihan*, 5 *How. Pr. R.* 321; and *Snyder agt. White*, ante page 321).

Such allegation in the answer can not, therefore, be stricken out as frivolous.

*At Chambers, February 1852.* This was a motion to strike out the defendant's answer as "frivolous," and for judgment under section 247 of the Code.

The complaint alleges that on the 3d day of June 1851, the defendants made their promissory note in writing, by which they promised, for value received, to pay to the order of the plaintiff one thousand dollars at the Otsego County Bank, six months from the date of the note that the said note became due before the

commencement of this action, yet the defendants have not paid the same. The plaintiff further alleges in his complaint that he is now the lawful *owner and holder* of said note, and that the defendants are justly indebted to him thereupon in the sum of \$1000 principal, with interest from the 3d day of December 1851, and demands judgment for the same. The complaint is duly verified by the oath of the plaintiff.

The defendants put in their answer under oath, and allege in the commencement of it, "that they have not sufficient knowledge or information to form a belief as to whether the said plaintiff is now the lawful owner and holder of said promissory note, mentioned in said complaint, therefore can not admit or deny the same."

H. LATHROP, *for Plaintiff.*

L. E. BOWE, *for Defendants.*

CRIPPEN, Justice.—This branch of the answer is a substantial compliance with the first subdivision of section 149 of the Code, and in its legal effect is a denial that the plaintiff was the lawful *owner or holder* of the note mentioned in the complaint.

The object of the pleader seems to have been to force the plaintiff to establish by proof on the trial, that he was the owner and holder of said note; or to make good by proof that allegation in the complaint. The making of the note is not denied by the answer, and therefore stands admitted. The plaintiff under the allegation of the answer, in order to sustain his action, must establish by proof his ownership of the note. This may probably be done by its production on the trial, on the ground that possession of it is *prima facie* evidence of ownership.

The ease with which the plaintiff may be able to establish his ownership of the note by proof on the trial, does not affect the question of the necessity of making such proof in order to establish the important fact, that he is the owner of it. If it was material for the plaintiff to allege ownership, in order to sustain his action, it is then quite clear that this branch of the answer is not immaterial or "frivolous." It casts the *onus probandi* on the plaintiff of proving his ownership of the note.

By the provisions of the Code, every action must now be prosecuted in the name of the real party in interest, except in cer-

tain specific cases, of which this action is not one (*Code*, §111). When that question is raised by the answer, as I conceive it to be in this case, it is incumbent on the plaintiff to show *prima facie* at least, that he is the party in interest, or owner of the demand or note on which the action is founded. The note declared upon in this action is made payable at the Otsego County Bank to the order of the plaintiff, in the ordinary form of a note to be discounted at said bank. The defendants may have good reasons for believing that the note in fact is the property of the bank and not the property of the plaintiff, and therefore may properly raise that issue by the answer.

An answer which denies a material allegation of the complaint, can not be stricken out on motion, as "frivolous" (*Davis vs. Potter*, 4 *How. Pr. R.* 155).

Justice PARKER, in the case cited, very properly says that "the general issue being abolished, the defendant instead of denying all, has denied one of the material allegations of the complaint, and he has a right to require that the issue thus joined shall be tried in the usual manner."

The case of *Beach vs. Gallup* (2 *Code R.* 66), decides that the allegation in the complaint, that the plaintiff is the owner of the note, is a material allegation; and a demurrer to the complaint for the want of such allegation, was refused to be stricken out as frivolous, on a motion made for that purpose.

It has long been the settled practice of the Supreme Court, to strike out pleadings which were clearly "frivolous," but the doctrine of the cases is that the court must be well satisfied that such pleading is clearly frivolous, and is interposed in bad faith for the purposes of delay or some other improper motive.

The answer in this action is verified by the oath of one of the defendants, and for ought that appears, was honestly and fairly interposed upon the record. Pleadings under the Code are to be liberally construed. In a case of doubt, the court will not adopt the stringent and summary mode of giving judgment by striking out a pleading as frivolous, under section 247 of the Code.

Having come to the conclusion that this notice can not be granted, it is unnecessary to examine or pass upon the other portions of the defendant's answer. Motion denied with costs.



## SUPREME COURT

THE PEOPLE ex rel. GALE, agt. THE TRUSTEES OF SCHOOL DISTRICT  
No. 13, in the towns of Busti and Harmony.

Where a collector of a school district is sued for acts done by him by virtue of his office, and he has incurred expenses thereby; and has served upon the trustees of the district due notice of an application to the board of supervisors of the county, with a copy of his account, verified as required by the statute (*Laws of 1847, p. 163, ch. 172, and amended by Laws of 1849, p. 545, ch. 388*), and the board make an order for the payment of such expenses upon the district, the trustees not appearing on the application; a *mandamus* will issue to compel the execution of such order, notwithstanding it may appear that the claim never was laid before or passed upon by the taxable inhabitants of the district, as required by the 1st section of the aforesaid act (1849).

*Chautauque Circuit and Special Term, September 1851.* The moving papers show that from January to 10th September 1850, the relator was collector of the school district No. 13, in the towns of Busti and Harmony, in Chautauque county, during which time he was sued for acts done in his official capacity as such collector, and was put to great costs and expenses in defending the suits.

That on the 11th day of December 1850, in pursuance of the act in relation to suits against district school officers, passed May 1st, 1847, he made application to the board of supervisors of said county for an order requiring the payment of such costs and expenses by said school district, having given the trustees due notice of the application, as required by said act. That such proceedings were thereupon had, that on the said 11th December 1850 an order was made and entered in the minutes of the board of supervisors at a legal meeting thereof, in the words and figures following, viz:

At a meeting of the board of supervisors of Chautauque county, held at the court house in Mayville, on the 11th day of December 1850, the following order was, by a majority of all the members elected thereunto, made and entered in the minutes of proceedings of said board, viz: "It is hereby ordered by the board of

supervisors of Chautauque county, that the account of Seymour Gale against school district No. 13, in the towns of Busti and Harmony, to the amount of twenty-six dollars and fifty-six cents, it being for costs, charges and expenses paid by said Gale in defending three several suits brought against him in his official capacity as collector of said district, be paid to him by such district. Dated Mayville, Dec'r 11, 1850.

R. E. FENTON, *Ch'n of Board.*

CHARLES CHADWICK, *Clerk of Board.*"

That on the 25th day of December 1850, the relator served a certified copy of such order on Eleazer Green, William Clark and William Kelso, who were then the trustees of said district. That more than thirty days have elapsed, and that the trustees have neglected and refused to issue their warrant to collect the amount so directed to be paid. That on the 9th September 1851, the term of office of said William Kelso expired, and John Kent was elected in his place.

The opposing affidavits show that when the relator served upon the trustees notice of his application to the board of supervisors for the order above set forth, with the amount of costs, charges and expenses claimed to have been paid by him, the trustees were told by the relator that one Norton was employed by him to present the application to the supervisors, and that Norton upon being referred to the acts of 1847 and 1849, on the subject, and being informed that the relator's claim had not been passed upon by the taxable inhabitants of the district, stated that the supervisors had nothing to do with the matter; and that the trustees therefore neglected to appear before the board to oppose it, believing from what passed between them and Norton, that the application would not be presented. The affidavits show that the claim never was, in fact, laid before or passed upon by the taxable inhabitants of the district, and state some other matters tending to impeach the justice and legality of some portion of the relator's claim. It appeared that the trustees had due notice of the application to the board of supervisors, and a copy of the relator's account verified according to the statute was served upon the trustees at the same time. The relator asks for a mandamus

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Gale agt. Trustees of School District.

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commanding the trustees to issue their warrant for the collection of the money as directed by the board of supervisors.

AUSTIN SMITH, *for the Relator.*

A. HAZELTINE, *for the Trustees.*

WELLES, Justice.—The law upon which the order of the board of supervisors was founded, is *ch. 172 of Laws of 1847 (p. 163)*, as amended by *ch. 388 of Laws of 1849 (p. 545)*. The first section of the first mentioned act makes it the duty of the trustees in certain cases to ascertain the actual amount of costs, charges and expenses paid by any officer of a school district in case of a suit commenced against him for an act performed by virtue or under color of his office, and to cause the same to be collected of the district, and paid to such officer.

The mode of ascertaining the amount is directed in the second and third sections of the act, which is by the claimant applying to the board of supervisors, after notice to the trustees, and service of a copy of the account duly verified.

The fourth section requires the trustees to issue their warrant for the collection of the amount directed by the supervisors to be paid, &c.

The act of 1849 merely substitutes an amended section in place of the first section of the act of 1847; and the only difference I can perceive between the original and amended sections is that by the latter, the trustees are not to take any action towards ascertaining the amount of the claim, unless a majority of the taxable inhabitants of the district shall first so determine.

In the present case, it is shown on the part of the defendants, that this claim has never been laid before or acted upon by the taxable inhabitants of the district, nor have they made any determination on the subject. But it is also shown that the relator gave due notice of the application to the board of supervisors, with a copy of the account sworn to as provided in the second section of the act. The act does not require the claimant to prove before the board that the taxable inhabitants have determined upon the allowance of the claim, or that any proceedings have been had by or before them on the subject of the claim. On

the contrary, the third section declares that upon the appearance of the parties, or upon due proof of service of the notice of the application and of the account, if the board shall be of opinion that the account, or any portion of it, ought justly to be paid, such board, by an order to be entered in its minutes, shall direct its payment. The same section declares that the account, with the oath of the party claiming it, shall be *prima facie* evidence of the correctness thereof. If, when this claim was presented to the board of supervisors, it was accompanied with proof of service of notice of the application and of such copy account, and no one appeared on behalf of the defendants to oppose its allowance and settlement, I think the board had jurisdiction to make the order. In such case it was not necessary for them to inquire whether the taxable inhabitants of the district had determined upon its allowance. The second section of the act made it the duty of the trustees to attend and protect the rights and interests of the district, and if they neglected so to appear, the supervisors were warranted in assuming that no good reason existed why the account should not be ordered paid. It is no answer, in my opinion, for the trustees to say at this stage of the business, that they supposed the application would not be made. If any deception was practiced upon them by the relator or his agents in reference to the presentation of the claim, their remedy, if they have any, must be otherwise than resisting the order of the board. After the board have acquired jurisdiction under the act, and have made the order, we can not go behind it for the purpose of inquiring after irregularities or omissions in the proceedings of the relator, before the making of the order. The act is imperative upon the trustees to issue their warrant for the collection of the money. This they have neglected, although more than thirty days have elapsed since a certified copy of the order was served upon them.

I shall, therefore, direct an alternative mandamus to issue, with ten dollars costs, &c. The order to be so drawn, that the costs of motion are only to be paid in case the trustees obey the writ at once, and not in case they make return, &c.



## SUPREME COURT

CRAIG agt. FANNING.

A nonsuit will not be set aside *on a special motion*, on the grounds that the judge received evidence prematurely, or refused to submit to the jury a question of fact proper for their determination. Erroneous decisions of the judge on the trial, can be corrected only on a case or bill of exceptions.

*Suffolk Special Term, March 1852.* The plaintiff, in person, moved to set aside the nonsuit in this cause for irregularity and surprise. He read an affidavit stating that issues of fact were joined on two special pleas to the declaration; that the cause was tried at the Suffolk Circuit in December 1851, before Justice Brown; that after the plaintiff had opened the case to the jury and was about to call his witnesses, "to his surprise," the defendant's counsel handed to the judge a bundle of papers, alleging the same to be a record of certain proceedings in the late Court of Chancery; that upon inspection of those papers the judge arrested the plaintiff in the further progress of the cause, and directed that he should be nonsuited, although he requested that the cause should go to the jury on the issues of fact.

Mr. GEORGE MILLER opposed the motion, on the plaintiff's affidavit.

S. B. STRONG, Justice.—The plaintiff does not state very clearly what were the issues of fact which he wished to have submitted to the jury. From what took place on the trial, the inference is that one of them was upon an allegation in the answer that there had been a decree of the late Court of Chancery, upon the subject matter of the controversy, which concluded the parties. The plaintiff's motion is based on the positions that he was taken by surprise; first, by the premature offer and admission in evidence of the decree in chancery; and secondly, by his being nonsuited upon that evidence, and that both proceedings were irregular. Where a party alleges surprise as a ground of his application for relief, he is bound to show that some act prejudicial to him has been done; which, with a proper inquiry into the facts of

his case he could not have anticipated, and against which he could not have protected himself with due vigilance. Now in this case, if the issue was what the proceedings stated in the affidavit indicate, it was a matter of course, that the decree would be given in evidence, and the plaintiff had, no doubt, abundant time to prepare his testimony, if any he had, to explain or controvert it. If the defendant's evidence was tendered prematurely, that would not have prevented the plaintiff from introducing his own testimony with the same effect as upon a later stage of the trial. But if the issue to be tried was upon the decree, the defendant held the affirmative, and then his evidence was properly offered and received. The other ground of the plaintiff's surprise was that he was nonsuited. Plaintiffs are not unfrequently surprised in that way, but that has never been deemed a sufficient ground for setting aside a nonsuit on a nonenumerated motion, unless it has resulted from some unexpected occurrence, against which the plaintiff could not have been reasonably expected to guard himself, and against which he could have protected himself had he been previously made acquainted with it. Nothing of the kind is alleged in this case. The plaintiff's surprise was caused by the refusal of the judge to send the case to the jury, and nearly all of his argument upon his motion was upon that point. Whether the course adopted by the learned judge was right or wrong, it is not material, nor would it be proper for me to decide on this motion. It is sufficient to say that if it was erroneous it can not be corrected on the ground of surprise. The alleged irregularities were in reference to the same particulars. These, as has been already mentioned, consisted in the reception of the evidence and granting the nonsuit. The decisions of a judge upon points of law raised on the trial could not, under the former system, be reviewed on a nonenumerated motion. Neither can they be under the existing code of procedure, on a special motion founded upon affidavits. However erroneous a decision of a judge in the progress of a trial may be, if it relate to the reception of evidence or granting a nonsuit, it is not an irregularity within the ordinary and technical meaning of that word. The unsuccessful party should resort to a case or bill of exceptions. Motion denied with seven dollars costs.

## SUPREME COURT.

CHAPPEL agt. SKINNER.

In an action to recover possession of personal property, the plaintiff can not have the defendant arrested and held to bail under § 179 of the Code, and have the property delivered to him before judgment in the action.

He has his election to proceed under *chap. 2, title 7* of the Code, to recover possession of the property, or to recover damages for the taking or detention; and having made his election he must abide by it. He can not commence his action and hold the defendant to bail, and have a delivery of the property too, pending the litigation.

*Monroe Special Term and Circuit, November 1851.* On the 8th day of October 1851, the plaintiff made an affidavit and obtained an order from a justice of this court, directing the sheriff of Monroe county to arrest the defendant and hold him to bail in the sum of \$600. &c. The affidavit stated in substance that the plaintiff was the owner of certain personal property, describing it, worth \$300; that he was entitled to the possession thereof, and that it was wrongfully detained by the defendant, upon certain pretences specified in the affidavit, and containing also the allegations or statements required by § 207 of the Code, to entitle the plaintiff to an immediate delivery of the property, and showing also, that the defendant had clandestinely taken the property away and concealed it, so that it could not be found by the sheriff. The summons was served and the defendant arrested and gave bail the same day.

On the 15th day of October, and before the defendant had answered the complaint, the plaintiff made another affidavit similar to the first, excepting the statement that the defendant had clandestinely taken the property away, &c., gave the undertaking required by section 209, and made an endorsement on the affidavit according to § 208; upon delivery of which last mentioned papers to the sheriff, the latter took the property from the defendant, and has delivered the same to the plaintiff. A motion is now made for an order vacating and setting aside the second affidavit, undertaking and direction endorsed, upon which the

property was taken by the sheriff, and that the possession of the property be restored to the defendant.

W. F. COGGSWELL, *for the Motion.*

E. A. HOPKINS, *Opposed.*

WELLES, Justice—The question in this case is, whether the plaintiff, in an action to recover the possession of personal property, can have the defendant arrested and held to bail under § 179 of the Code, and have the property delivered to him, before judgment in the same action?

The action to recover the possession of personal property, is one peculiar in its character and object. The Code has given it in place of the former action of replevin, and its design is to subserve the same purpose. It is regulated by ch. 2, of title 7 of the second part of the Code (§§ 206 to 217 inclusive). There are other provisions which have an incidental and collateral application to it.

The first chapter of the same title contains provisions respecting arrest and bail in personal actions generally, and among them is the case mentioned in the 3d subdivision of § 179, which authorizes an arrest “in an action to recover the possession of personal property unjustly detained, where the property or any part thereof has been concealed, removed, or disposed of, so that it can not be found or taken by the sheriff, and with the intent that it should not be so found, or taken, or with the intent to deprive the plaintiff of the benefit thereof.” That is the only provision authorizing the arrest of the defendant, in an action to recover possession of personal property. The first subdivision of the same section, authorizes the arrest of the defendant, where the action is for an injury to person or character, or for injury, or for wrongfully taking, detaining or converting property; by which is intended, an action to recover damages for such injury, taking, detaining, or converting; answering to our late actions of trespass, case, trespass *de bonis asportatis* and trover, and not an action to recover the possession of personal property.

Cases may arise, where the plaintiff has his election to proceed under ch. 2, title 7, to recover possession of the property, or to recover damages for the taking or detention; and, I think, in



this case, according to the plaintiff's affidavits, he had such election. Indeed, he would be entitled to such election in any case where he could proceed under chapter 2, to recover possession. But where he has once determined his election, he must abide by it, and is not at liberty afterwards to change his ground. He has not the right, as I think, to commence his action, and hold the defendant to bail, and afterwards have the property delivered to him. This would be oppressive to the defendant, and it seems to me was never contemplated or intended by the legislature.

The plaintiff's course was to have pursued the proceedings pointed out in chapter 2, above referred to, which do not authorize the defendant's arrest; and if the property could not be found, and the case is within the 3d subdivision of § 179, to obtain an order and have the defendant arrested; but in that case he can not afterwards obtain the possession of the property pending the action.

Having in this case elected to have the defendant arrested and held to bail in the first instance, under one of the subdivisions of § 179, I think the plaintiff was bound to wait until he was entitled by the judgment of the court to the possession of the property, before causing it to be delivered to him. I am not able to perceive that the defendant has done any thing by which he waived the right to have the property restored to him.

The motion must be granted, but without costs; as this is the first time, of which I am aware, that the question has arisen.

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NOTE.—*Abbey agt. Abbey.* The Supreme Court at the last January general term (1852), in the second judicial district, dismissed an appeal in this action taken from an order at special term *granting temporary alimony*. The appeal was sought to be sustained upon the ground that the order granted a "*provisional remedy*" and was therefore appealable under § 349 of the Code. The court, MORSE, Justice, held that such an order was not a provisional remedy within the provisions of the Code; that it was no more appealable as a provisional remedy than as an order not involving the merits or some part thereof. It was of a class of orders which depended upon the discretion or favor of the court.

Another appeal in the same action, taken from an order granting an attachment for disobedience to the order for temporary alimony, was dismissed on the same grounds.

## SUPREME COURT.

## PERKINS AND BROWN agt. WARREN.

Where, during the pendency of an action, it shall appear by affidavit, that the defendant threatens, or is about to remove or dispose of his property, with intent to defraud his creditors, a temporary injunction may be issued, under the last clause of section 219 of the Code, to restrain such removal or disposition.

But such remedy by injunction is only applicable where the act is threatened, or is about to be done, and not when it has been done.

Nor is a plaintiff entitled to an injunction in such case, unless he establishes an equitable ground for interference, by showing that he is a creditor, or that he will be injured by the threatened fraudulent transfer.

An injunction ought not to be issued on such an application, where the plaintiff's demand is denied on oath by the defendant, and is unsupported by any evidence, and there is no proof that the plaintiff has any interest in restraining the defendant.

Where the legal right of the plaintiff is denied by affidavit as broadly as it is asserted, the application stands upon the same ground and should be governed by the same rule, as where the whole equity of a complaint is denied by the answer.

*Albany General Term, December 1851—Before Justices HARRIS, PARKER and WRIGHT.* This was an appeal from an order of Justice HARRIS, allowing an injunction.

The action was commenced in December 1850, to recover a balance of between four and five thousand dollars, which the plaintiffs claimed to be due them for cash advances made to the defendant. The cause being at issue, was referred to a referee, before whom the trial was commenced on the first day of October at 3 o'clock P. M. The trial, after proceeding several days, was adjourned to the 9th day of December following. It is alleged in the affidavit upon which this motion was founded, that the defendant had, "by several orders staying plaintiff's proceedings for commissions not executed, and otherwise, succeeded in delaying the proceedings for a great length of time, and for the purpose, as it was believed, of making a fraudulent disposition of his property, to defeat the collection of the judgment to which the plaintiffs were entitled, that the last order staying the plain-

tiff's proceedings was vacated on a motion made in the defendant's presence, when one of the plaintiffs, in an affidavit, charged that object upon the defendant.

It also appeared by the affidavit of James N. Halsted, a justice of the peace residing in the same town with the defendant, that on the morning of the day on which the trial was to commence, he was requested to go to the house of the defendant, and, upon his arrival there, he found the defendant and one Perry Warren, his cousin, and a deed from the defendant and his wife to Perry Warren, was then executed and acknowledged. Also a bill of sale of the defendant's personal property. The deed conveyed the farm upon which the defendant resided. Another deed was also executed and acknowledged conveying a farm lying in an adjoining town. The quantity of land conveyed was about 538 acres. At the same time, notes were executed by Perry Warren to the defendant, payable at different times, and amounting in the aggregate to about \$13,000, being the price of the real and personal estate so conveyed.

Upon affidavits showing these facts, an order was made requiring the defendant to show cause why an injunction should not issue, restraining the defendant from removing or disposing of or conveying away his property; and in the mean time restraining such removal or disposition.

In opposition to the motion, the affidavit of the defendant was read, stating that the conveyance of his property to Perry Warren had no reference to the suit pending between him and the plaintiffs; that the sole reason of his making the sale was his ill health and his consequent inability to superintend and carry on the business. It further appeared that the defendant had for the last two years offered his farm for sale, and had on one occasion been in negotiation with a purchaser for such sale. The defendant also stated that he still owned 250 acres of good farming land, worth between seven and eight thousand dollars; and besides this he had property free and clear of all incumbrances, and above all debts and liabilities, more than sufficient to pay and satisfy any judgment which the plaintiffs could by possibility recover against him.

On these facts, and others appearing in the opinion of the

court, Justice HARRIS allowed an injunction, and gave the following reasons:

HARRIS, Justice.—No more radical change has been made by the Code than that contemplated by the single clause in the 219th section, upon which this application is founded. This provision was first adopted in the amended Code of 1849, and was no doubt intended as a substitute for proceedings in similar cases, under the “act to abolish imprisonment for debt.”

The only question is, whether the plaintiffs have made a case which entitles them to the injunction for which this statute provides? Does it appear that the defendant threatens, or is about to remove or dispose of his property with intent to defraud his creditors? The principal facts from which it is insisted that such fraudulent intent is to be inferred are, that the defendant, being the owner of two farms in the county in which he resides, on the morning of the day on which the trial of an action, in which the plaintiffs sought to recover a judgment against him for several thousand dollars, was to commence, and after such trial had been delayed for several months, at least, conveyed to his relative both farms and all his personal property, liable to execution, without receiving any payment therefor, or any security, except the promissory notes of the purchaser, payable at future periods. Such a transaction is certainly unusual. The fact that so large an amount of property passed out of the defendant's hands into the hands of his cousin just upon the eve of the trial of this action, excites the irresistible suspicion that the transfer had some reference to the result of such trial. And then, when it further appears that the defendant received no part of the purchase money, and that no securities were executed therefor, except the notes of the purchaser, and those payable at remote periods, it is difficult to believe that the defendant had no other object in view than an ordinary sale of his property. Nor do I think these circumstances, tending, as they do so strongly, to establish a fraudulent intent, are satisfactorily explained by the defendant. He states, it is true, that for several years he had been desirous of selling his farm, and that this was publicly known; but then he does not state, what would have been a very material circumstance in



making out the good faith of this singular transaction, that Perry Warren had been desirous of purchasing all or any of his property, or that any negotiation had ever been\* had in relation thereto. It does not appear that the sale was ever mentioned or thought of by either the defendant or Perry Warren, until the very day the transfer was made, when the defendant had some reason at least to apprehend that a judgment for a very serious amount was impending over him. Upon the whole, I think the case, as it is presented by the affidavits before me, abundantly justifies the conclusion that it is the purpose of the defendant so to dispose of his property as to place it beyond the reach of the plaintiffs. It is, therefore, a proper case for the injunction for which the statute provides.

It was contended by the defendant's counsel that the injunction, if allowed, should only restrain the defendant from removing or disposing of his property *fraudulently*. Such an injunction would, in my judgment, be simply absurd. It would be saying to the defendant, in effect, "you may remove or dispose of your property, as the plaintiffs apprehend you will, so as to place it beyond their reach, when they obtain judgment; all that is enjoined upon you is, that you do it with honest motives." The act is not restrained, but the fraudulent intent. Such an injunction would be of no practical effect, and I am sure was never intended by the legislature. I think the preliminary injunction already allowed should be continued until the further order of the court.

The defendant thereupon appealed to the general term.

J. WHIPPLE JENKINS, *for Plaintiffs*.

W. A. BEACH, *for Defendant*.

By the Court, PARKER, Justice.—The injunction order appealed from enjoined and restrained the defendant Henry Warren, his agents and attorneys, from removing, or in any way or manner disposing of any of the property, real or personal, of said defendant, and particularly from transferring or disposing of any due bills or promissory notes given by one Perry Warren to said defendant, on or about the first day of October 1851, until the further order of the court or of the justice making such order.

This action was brought to recover an alleged balance of an account, amounting to between four and five thousand dollars. The claim thus made by the plaintiffs was denied by the defendant, who insisted that there was a balance due to him from the plaintiffs of between two and three thousand dollars. The cause had been referred to a referee and was pending before him at the time the order appealed from was made.

The order was made on proof by affidavit, that on the first day of October 1851, and since the commencement of this suit, the defendant sold and conveyed to his cousin, Perry Warren, real and personal property, to the amount of 13,000 dollars, for which he took the notes of the said Perry Warren. The motion was heard on affidavits after an order to show cause. It was claimed that the transfer of property complained of was made to defraud creditors. The plaintiff Brown made affidavit that he had entire confidence that the plaintiffs would recover judgment against the defendant for the amount claimed. It was shown that in the progress of the cause the defendant had obtained several orders for commissions not executed, and otherwise, which it was alleged were for the purpose of delay, and of giving defendant an opportunity to dispose of said property. In answer to the motion the defendant made affidavit that he believed he had a good defence on the merits; that the claim made in this cause by the plaintiffs was wholly unfounded and unjust, and that he had entire confidence that he should be able to recover against the plaintiffs between three and four thousand dollars; and the defendant also denied that he had obtained any orders for the purpose of delay; that the transfer complained of had no possible reference to the claim made by plaintiffs, or to the possibility of their recovering a judgment against him; that in consequence of ill health, by reason of which he had been unable to work the farm, he had intended to sell it ever since 1846; and that he still owned 250 acres of good farming lands worth between seven and eight thousand dollars, and was worth over and above said lands, and free and clear from all incumbrances and above all debts and liabilities, more than enough to pay and satisfy any judgment the plaintiffs might by possibility recover against him. The defendant further showed by the affidavit of a third person, that defendant had fre-

quently offered his property for sale during the last two years, and that the property was sold to Perry Warren for a fair and adequate consideration, and that Perry Warren was believed and reputed to be wealthy and entirely responsible for the money agreed to be paid for the property bought by him, independent of the property so purchased.

The power to make the order appealed from is claimed to have been conferred by the last clause of section 219 of the Code, in the following words: "And where, during the pendency of an action, it shall appear by affidavit that the defendant threatens, or is about to remove or dispose of his property with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition."

The order appealed from is as broad in its operation, if not as full and particular in its language, as an injunction granted on a creditor's bill under the practice of the late Court of Chancery, or an order made in proceedings supplementary to execution under the last clause of section 298 of the Code. Such an order could not be made under the late chancery practice, and can not be made now, under the section last cited, until the plaintiff shall not only have established his demand by obtaining judgment, but shall also have attempted, unsuccessfully, to collect it on execution.

It is a most important question of practice to inquire, whether under the last clause of section 219 of the Code above cited, an injunction may now be obtained during the pendency of the action, that shall stop every business transaction of the defendant, and paralyze his power over his property, whenever a plaintiff shall succeed in satisfying a justice of this court or a judge of the county court, that some transfer of property made by the defendant was so made with the intent to defraud creditors. If this can now be done, it is not only a new practice, but one most destructive to the business of a defendant. Such an interference, if it could be permitted on a mere *claim* of indebtedness, would be greatly prejudicial to the commercial interests of the community. It has long been regarded as a cardinal principle, that the legal right of the plaintiff must be established before he can call to his aid the extraordinary power of a court of equity; and

a writ of injunction could never be granted, where there was doubt about the legal right. The law was still more careful in protecting a defendant from interference by an injunction that would suspend all his business operations; for in addition to establishing the legal right by the recovery of a judgment, it required the plaintiff first to make the attempt to collect his demand by execution.

If the law is now changed so as to permit an injunction like this to issue *pendente lite*, then our practice presents this extraordinary feature, that the same remedy may now be had on application before judgment, as on application after judgment and execution returned unsatisfied. The facts to be set forth would be somewhat different; as, in the former case, it would be necessary to show an intent to defraud, but the remedy would in both cases be the same.

In giving effect to the section under which this extraordinary power is claimed, we ought to be limited by the language employed. We should exercise no power not expressly conferred. The language of BRONSON, J., in speaking of a less summary statute, the non imprisonment act, in *The People vs. The Recorder of Albany* (6 *Hill*, 432), is fully applicable here. He said "the more I see of these summary proceedings, the more fully I am convinced they should be carefully watched. They will otherwise be turned into the means of oppression."

The statute (*Code*, § 219) only authorises a temporary injunction where it shall appear by affidavit that the defendant *threatens, or is about to remove* or dispose of his property with intent to defraud his creditors: and then the injunction can only restrain "such removal or disposition," that is to say, the removal or disposition threatened, or about to be made. If it be a threat to remove property generally, the injunction may perhaps, there being no other objection, be as general as the threat. But, I am inclined to think, the statute was only intended to prevent the consummation of some particular act, which the defendant threatens or is about to do, rather than to restrain generally the sale or disposition of property, and thus tie up all the business concerns of the defendant, pending a litigation.

But it is only when the act is threatened, or about to be done,



and not when it has been done, that this court is authorized to interfere during the pendency of an action. The remedy given is preventive merely. The facts disclosed by the affidavits did not bring this case within the terms of the act. Here the property had been sold and conveyed, and there was no proof whatever that the defendant threatened, or was about to remove or dispose of the notes he had received for the property.

I think it is a mistake to suppose that this provision authorizing a temporary injunction was intended as a substitute for proceedings under the act "to abolish imprisonment for debt." The provisions of that act are still unrepealed and in full force (*Code*, § 471). The transaction complained of, if made with the intent to defraud creditors, might fall within the provisions of that act, (section 4, subdivision 3, 2 *R. S.* 3d ed. 107), which authorizes a warrant to be issued where it is shown that the defendant *has assigned, removed or disposed of*, or is about to dispose of any of his property with intent to defraud his creditors. The provisions are entirely unlike and with good reason. Under the non imprisonment law the defendant may be arrested to answer for a past transaction. If the allegation made against him is controverted, a trial takes place on legal evidence; and if convicted of the fraudulent act charged, the defendant is to be punished by imprisonment. Under the section of the Code in question, the court has no power to punish for an act already committed: it can only prevent the commission of threatened or apprehended fraudulent acts. I think the provision of the statute authorizing an injunction, inapplicable to the facts shown by the affidavits.

A reasonable construction must be given to the clause in question. The language is general. "Where during the pendency of an action, it shall appear," &c. It certainly can not be supposed that this remedy by injunction may be granted in every action that may be brought. There may be cases in which the plaintiff will have no interest in thus enjoining the defendant. Suppose, for instance, an action to compel a specific performance, or an action to redeem; a fraudulent transfer of property not involved in the litigation, would give no reason for interference by injunction. I think all that was intended by the legislature in using such general language, was to make the statute broad

enough to cover every case where there may be an equitable ground for interference.

If this is the correct view of the statute, there is no reason for supposing that the legislature intended to give such a remedy by injunction, when the legal right of the plaintiff was controverted and denied upon oath. In this case the plaintiff swears to a balance due him from the defendant of between four and five thousand dollars. This was enough, *prima facie*, to establish his right. But on showing cause, the defendant denied this demand on oath, and claimed a balance due him from the plaintiffs of between two and three thousand dollars. The legal right of the plaintiff was thus denied as broadly as it was asserted; and there was no more reason to suppose a balance due from the defendant than from the plaintiffs. The defendant, in my opinion, had just as good a right to watch over the transactions of the plaintiffs as they had to question those of the defendant. Under such circumstances, I think, an injunction should have been refused, even if the affidavits had made out a case of apprehended fraudulent transfer. The plaintiff's demand being denied on oath, and not being supported by any evidence, there was no proof that he had any interest in restraining the defendant. It was like the well settled equity practice, by which an injunction is dissolved, if the whole equity of the complaint is denied by the answer.

I think the defendant put at issue the whole equity of the application by denying on oath the existence of any demand in favor of the plaintiffs against him. He denied also the fraudulent intent. I admit that a mere denial of a fraudulent intent can not avail a defendant where the facts established authorize a legal inference that the intent was fraudulent. But in this case facts were set forth by the defendant, going to show the improbability of such intent. The entire solvency of the defendant, and the fact that the defendant was still the owner of real estate worth between seven and eight thousand dollars, were also shown in answer to the application.

But without deciding whether there was sufficient evidence of a fraudulent intent, I think, for the reasons above set forth, that the learned justice erred in granting the order appealed from and that it should be reversed, with \$10 costs.

## SUPREME COURT.

MERRITT agt. SLOCUM.

The 402d section of the Code says: "when a notice of a motion is necessary, it must be served eight days before the time appointed for the hearing; but *the court or judge* may, by an order to show cause, prescribe a shorter time." The question is, can *any* judge at chambers make such an order (prescribing a shorter time), in a case not to be heard before him? *Held* that he can not. Why? Because the true construction of the section forbids it;

It says, "*the court or judge*," in contradistinction to "the court or a judge," as is frequently used where the Code evidently intends to give a particular power to *any* judge.

The *court* may make the order; and *the judge* before whom the hearing, out of court, is to be. But if the hearing is to be before the court, no judge out of court can make the order.

*Albany Special Term, August 1851.* The plaintiff having, on the 21st of August 1851, obtained the report of a referee upon certain matters referred to him by a rule of this court, previously made in this cause, on the next day applied to the recorder of Troy, and obtained from him an order requiring the defendant to show cause, at the special term of this court to be held on the 26th of the same month, why the report should not be confirmed and why the plaintiff should not have certain other relief mentioned in the order. The plaintiff's counsel having moved for the relief sought by him, it was objected on the part of the defendant that proper notice of the application had not been served.

A. K. HADLEY, *for Plaintiff.*

T. C. RIPLEY, *for Defendant.*

HARRIS, Justice. The application in this case is one which can only be granted upon notice. Such notice is required by the 402d section of the Code to be served eight days before the time appointed for hearing. But here the plaintiff only obtained the report upon which his application was founded five days before the term at which he wished to make his motion. He therefore obtained from the recorder of Troy the order to show cause, claiming that he had authority under the last clause of the section of

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Merritt agt. Slocum.

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the Code already cited, to make an order prescribing a shorter time for giving notice of the application. The objection raised by the defendant's counsel involves the construction of that provision in the Code. It declares that "the court or judge may, by an order to show cause, prescribe a shorter time" than eight days for notice of a motion. It has been supposed that under this provision any judge might, in his discretion, make an order which should, in effect, dispense with eight days notice of a motion. I have myself practiced upon this construction of the statute, and I understand others have done the same. But I am satisfied, upon more careful attention to the terms of the section, that it will not bear this construction. "*The court or judge,*" not "*the court or a judge,*" may make the order. The court may hear a motion; and, in certain cases, a judge, out of court, may hear a motion. The court may, by its order, prescribe a shorter time for giving notice of a motion to be made before the court, than that prescribed by law. A judge, likewise, when a motion is to be made before himself may prescribe a shorter time. But I do not think it was the intention of the legislature that *any* judge, at chambers, should have the power of prescribing a shorter time than eight days for serving notice of a motion to be made in court, or before another judge. That this is so, will be manifest, I think, by comparing the language of the section with that of other sections conferring power upon a judge at chambers. Thus, the 158th section declares that "the court or *a judge thereof,*" &c., may order a further account, &c. By the 218th section the order of injunction may be made by the court, or by *a judge thereof.*" Under the 225th section a defendant may apply to "*a judge of the court*" to vacate or modify an injunction. Other instances might be cited, but these are sufficient for my purpose. In all these cases the authority given is conferred upon *any* judge. The *indefinite* article is prefixed to the term *judge*. But in the section under notice the *definite* article is used. It is "*the court or judge,*" that is, the court or *the judge*, may make the order, and not the court or *a judge*. Who then may make the order contemplated by this section? That the court may make it, is not questioned. But what judge may make it, out of court? Not *any judge*, but *the judge*. It is the judge



before whom the application to which the order relates, is to be made. If the application is not to be made before a judge, out of court, then no judge, out of court, can make the order to show cause. This, I have no doubt, is the true meaning of this provision of the Code. It follows, that the order to show cause in this case was not effectual to confer upon the plaintiff the right to make this motion without giving eight days notice. The motion must, therefore, be denied for want of sufficient notice, but without costs and without prejudice.

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## SUPREME COURT.

### BENEDICT AND OTHERS agt. DAKE.

An *entire complaint* can not be stricken out as irrelevant or redundant, on motion. Why? Because if leave was granted to serve a new complaint, it would be giving to the motion the effect of a demurrer. Giving effect to the motion merely, would leave both parties in court without the power of proceeding in the action until special relief should be granted.

Nor can a portion of the complaint be stricken out on such a motion, as irrelevant or redundant, where there is no specification of what portion is objectionable. The alleged irrelevant or redundant matter should always be clearly pointed out by the moving party—analagous to the old practice of exceptions for impertinence.

*It seems*, that a complaint containing allegations of fraud, which are substantially the same as are necessary in an indictment for obtaining goods under false pretences, constitute a good cause of action.

*Albany Special Term, October 1851.* Motion to strike out complaint, on the ground “that it states the evidence, and not the facts which constitute the cause of action, and that it is not in ordinary and concise language, without repetition, as required by the 142d section of the Code; and also that the same is irrelevant and redundant.

EVERY, HOAG & MCKINDLEY, *for Plaintiffs*

PLATT POTTER, *for Defendant.*

HARRIS, Justice.—The motion to strike out irrelevant or redundant matter, is a substitute for exceptions for impertinence under the former practice in chancery (Carpenter agt. West, 5 *How. Pr. R.* 53); Rensselaer and Washington Plank Road Co. agt. Wetsel, 6 *id.* 68). Was it ever known that an entire pleading was struck out for impertinence? I am not aware that any such practice was ever sanctioned. If the pleading contains a cause of action or a defence, then it is not all impertinent. If it does not, then the objection should be taken by demurrer. It is true, that in *Shaw vs. Jayne* (4 *How.* 119), Mr. Justice WELLES did say, that if the motion had been to strike out *the whole complaint*, it would have been granted. This remark, however, was but a *dictum*. The case before the learned judge presented an aggravated departure from the mode of pleading prescribed by the Code. The plaintiff in an action for false imprisonment, had with great circumlocution and particularity of detail, set forth in his complaint the facts and circumstances which he proposed to prove, to establish his cause of action. The plaintiff very properly moved to strike out these portions of the complaint. The judge, manifesting a degree of indignation, not very inappropriate, at this abuse of “the reformed practice,” not only granted the motion, but added that if it had been asked for, he would have stricken out the whole complaint. Perhaps the learned judge had in view, when he made this statement, the authority conferred upon the court by the latter clause of the 160th section.

Suppose this motion were to prevail, in what condition would it leave the parties? It is true, the court might grant the plaintiff leave to serve a new complaint; but if so, it would be giving to the motion to strike out irrelevant matter, the effect of a demurrer. Giving the defendant the effect of his motion merely, would leave both parties in court without the power of proceeding in the action until special relief should be granted by the court.

Nor can the defendant, upon this motion, have a portion of the complaint stricken out, though it be in fact irrelevant or redundant. As in the case of exceptions for impertinence, so in a motion like this, the party who seeks to have matter expunged, must specify the parts of the pleading which he deems irrelevant or redundant. It is requiring too much to subject the court to

the necessity of examining the entire pleading and selecting such parts as should properly be removed. It is enough for the court to decide when matter alleged to be irrelevant or redundant, is specifically pointed out, whether it is, in fact, so or not. This is the legitimate office of the motion authorized by the 160th section of the Code (see *White vs. Kidd*, 4 *How.* 68).

But if this motion could be entertained, I do not think it should be granted. The gravamen of the plaintiff's complaint is fraud. They allege that the defendant by false and fraudulent representations, obtained goods of them, the value of which they seek to recover in this action. The complaint, though not very methodically expressed, is brief, and with the exception of one or two passages, pertinent to the cause of action. The plaintiffs state what were the representations made to them by the defendant, and that, relying upon those representations, they sold him goods upon credit, and then allege that the representations were false and fraudulent. Nothing short of this would have constituted a sufficient complaint for such a cause of action. These are the facts which constitute the cause of action, and not the evidence, as the defendant's counsel seems to suppose. The evidence to establish these facts will be quite a different thing. To allege, in general terms that the defendant had obtained goods by fraudulent representations would no more constitute a sufficient pleading, than it would to allege that the defendant had slandered the plaintiff, without specifying the slanderous words. The allegations in this complaint are substantially the same as in an indictment for obtaining goods by false pretences. I am inclined to think it states a good cause of action. If the defendant shall be advised that it does not, he will be at liberty to present the question by demurrer, or take the objection upon the trial.

This motion must be denied with costs.

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Nichols agt. Jones.

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## SUPREME COURT.

NICHOLS agt. JONES.

**What is a *sham answer*?** Its essential element is *falsity*. The Code having abolished the general issue the true rule is now to strike out all answers or defences (not sworn to) as *sham* under § 152; where they appear clearly to be *false*, whether they are good in point of law on their face or not.

**What is a *frivolous answer*?** One which, if true, does not contain *any defence* to any part of the plaintiff's cause of action. Its insufficiency, as a defence, must be so glaring that the court can determine it, upon a bare inspection, without argument. It differs from a *sham* answer, in this: one is always *assumed to be true*; and the other must always be *proved to be false*.

**What is *irrelevant* or *redundant* matter in an answer?** It is superfluous matter incorporated with an answer, otherwise good. Section 160 does not refer to a *whole* answer or defence, in authorizing irrelevant or redundant matter to be stricken out.

If an answer otherwise good, is loaded with unnecessary and redundant matters, the plaintiff should move, under § 160 to expunge them;

If doubts are entertained as to its sufficiency in law, a demurrer is the remedy;

If palpably insufficient, a motion for judgment on the ground of its *frivolousness* should be made;

And if the matters of defence can be shown to be clearly false, a motion to strike out as *sham*, will reach the evil.

*Dutchess Special Term, February 1852. Motion to strike out answer as sham, irrelevant and frivolous.* The complaint alleges that on the 23d June 1851, the defendant made and delivered two promissory notes for \$200 each, payable in two, and four months; and that the defendant was also indebted on account, for goods sold, in the sum of \$684.48; that being a balance of an indebtedness of \$1084.48; for a portion of which said notes were given; and prays judgment for the sum of \$1084.48, and interest.

The answer of the defendant "shows that he did make" the notes; that the plaintiffs are not the lawful holders thereof; and that there is nothing due thereon.

The defendant further says that he has no *recollection*, sufficient to form a belief, as to the specific sum to which the bills of



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Nichols agt. Jones.

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goods in the plaintiffs' complaint mentioned, amount; and he, therefore, can not either admit nor deny that he remains indebted to the plaintiff thereon in the sum of \$684.48."

The answer is accompanied by an offer to allow judgment to be taken against the defendant for \$684.48, with interest, costs and disbursements.

The suit was commenced in December 1851, and the pleadings are sworn to.

The plaintiffs now move to strike out the latter portion of the answer, or all that part which does not relate to the notes, "as a sham answer or defence, irrelevant and frivolous;" and for such order or judgment as may seem proper, &c.

DEAN & REYNOLDS, *for Plaintiffs.*

JAMES EMOTT, *for Defendant.*

BARCULO, Justice.—The threefold aspect of this motion is not a bad illustration of the confused notions entertained by many of the profession, as to the proper mode of getting rid of a bad pleading. The plaintiff's counsel insists that this answer is *sham*, or if not, that it is clearly *frivolous*; or, at all events, the matter is *irrelevant*; and upon one of these grounds, it should be stricken out under sections 152, 160 or 247 of the Code.

I propose briefly to examine these several terms, and ascertain whether these remedies really run into each other, or stand distinct and separate.

And first, we will inquire what is a *sham* pleading? According to Webster, the word means, "false, counterfeit, pretended." Mr. Chitty says it "is the pleading a matter known by the party to be false, for the purpose of delay, or other unworthy object" (1 *Chit. Pl.* 541). The same author states that the English courts permit the plaintiff to sign judgment as for want of a plea on an affidavit that it is false. Our Supreme Court, as early as the case of *Steward vs. Hotchkiss* (2 *Cow.* 635), ordered a plea to be stricken out on the ground of its being false. The same was done in *Brewster vs. Bostwick* (6 *Cow.* 34); and from that time the practice has been uniform to strike out pleas clearly false, excepting, always, the plea of the general issue.

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Nichols agt. Jones.

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We thus learn that the essential element of a sham plea, is its *falsity*. For although some of the cases speak of its being also interposed as a sham plea for the purposes of vexation and delay, yet it is obvious that this is a necessary *inference* from its known falsity. A defendant must have some such "unworthy object" in view when he deliberately puts in a plea which he *knows to be false*. It seems to me, therefore, that the true rule to be adopted, under the Code which has abolished the general issue, is *to strike out all answers or defences as sham, under section 152; when they appear clearly to be false, whether they are good, in point of law, on their face or not*. This accords with the reason given by Judge Savage in *Brewster vs. Bostwick*, where he says: "The great object is to prevent delay and expense to the plaintiff; and consuming the time of the courts in passing upon pleas which are a mere fiction, an unseemly and expensive incumbrance upon the record, and a fraud upon the rule which allows double pleading. Whatever be their legal merit (and we admit that one of these pleas is of a very familiar and ordinary character, and unquestionably good on its face), we can not sit here to pass upon them, or any question growing out of them; nor should they be retained upon the record." In that case a plea of accord and satisfaction, in the usual form, was struck out on an affidavit of its falsity.

The only apparent difficulty in applying this rule is to determine what shall be deemed conclusive evidence of the falsity of a pleading: and I suppose that the falsity must be admitted or clearly established. This may result sometimes from the form of the pleading itself; as, where a defendant pleaded a former judgment recovered before the cause of action accrued. Or it may be so plain and palpable as to admit of indisputable proof; as where it appears by the affidavit of the plaintiff, and is not denied by affidavit on the part of the defendant. If, however, in the latter case the defendant comes forward in reply to the motion, and swears to the truth of his answer, it can not be stricken out; for the court will not determine the question upon a balance of testimony. The evidence of its falsity must be clear and *undisputed*.

This view of sham pleadings is derived from the law as it stood before the Code. That act does not give us any new definition; and hence we must presume that in speaking of such pleadings, its authors intended to embrace sham pleas as they were then known to the law.

2. A *frivolous* answer is quite a different thing. It is an answer which, if true, does not contain any defence to any part of the plaintiff's cause of action; and its insufficiency as a defence must be so glaring that the court can determine it, upon a bare inspection, without argument. It differs totally from a *sham* answer in this; that the one, is always *assumed to be true*; and the other must always be *proved to be false*: one is always bad on its face; the other generally good; one is decided by inspection; the other, on proof aliunde. I can not concur with those who suppose that sham and frivolous pleadings are confounded under the Code. I think they occupy, as they always did, distinct grounds. The Code itself very properly makes a distinction, by confining "*sham*" to defences, and applying "*frivolous*" to demurrers, answers and replies (§ 247).

3. Section 160 authorizes the court to strike out *irrelevant* or *redundant* matter; and this authority is invoked by plaintiff's counsel in this case. I understand this clause, however, to refer rather to superfluous matter incorporated with a plea, otherwise good, than to a whole answer or defence. Where an entire defence to the whole, or to some part of the demand is complained of, the objection can not properly be taken by motion to strike out as irrelevant or redundant, but resort must be had to one of the two former modes of proceeding, or to a demurrer.

Upon the whole, I think, the various provisions of the Code on this subject are consistent, and cover the whole ground precisely; neither more nor less. If an answer, otherwise good, is loaded with unnecessary and redundant matters, the plaintiff's counsel should move, under section 160, to have such matters expunged. If doubts are entertained as to the sufficiency in law of the answer, and the opinion of the court is desired, it must be obtained by demurrer. If, however, any defence is palpably insufficient, a motion for judgment, on the ground of frivolousness, is the pro-

per course; and if the matters of defence can be shown to be clearly *false*, a motion to strike out as *sham*, will reach the evil. These four modes cover all defects in an answer.

Judges will probably differ as to the propriety of entertaining a motion to strike out an answer as *sham*, when the pleadings have been sworn to. My impression would be in favor of such a practice. It can not be disguised that the ordinary affidavit verifying a pleading is regarded too much as a matter of form, both by clients and attorneys. It is not at all uncommon, at the circuit, to find the evidence on the trial absolutely inconsistent with the truth of some of the sworn pleadings; while the entire failure to offer any proof to sustain them, affords some ground for suspecting that they were known to be false when sworn to. It would seem, therefore, that a plaintiff ought to be permitted upon due proof of the falsity of an answer, to move to strike it out, although sworn to, in order that the defendant may meet it directly and distinctly, after his attention has been called to the subject. For no reason can be given for retaining a false answer, while many can be given for striking it out. It prejudices the parties, as well as the court and other suitors, and no harm can result from giving every reasonable facility for getting rid of it. Such seems also to have been the opinion of Justice EDMONDS in *Mier vs. Cartledge* (4 *How.* 115). It may not be improper to add, by way of illustrating the careless manner of verifying pleadings, that in this case there is a direct contradiction, in a matter which would seem to be within the knowledge of both of the deponents. One of the plaintiffs swears to the complaint, which alleges positively the making of two notes by the defendant; setting forth copies. The defendant in his sworn answer expressly denies the making of said notes, or either of them. How these two verifications are to be reconciled without an extraordinary degree of charity or credulity, I am unable to conceive.

That portion of the answer which the plaintiff moves to strike out here is not a *sham* defence, for the reason that it is not shown to be untrue. Nor can it be struck out as redundant matter; for it is, if any thing, an entire defence to one branch of the plaintiff's case. But it is *frivolous*, because it does not set forth any thing which amounts to a denial or a plausible defence. The



mere fact that the defendant has no *recollection as to the specific sum to which the bills of goods amounted to*, is not such a denial as is authorized by the Code, or any other system of pleading. By § 149, the defendant is required to deny specifically "each material allegation of the complaint controverted by the defendant, according to his knowledge, information or belief; or of any knowledge or information thereof sufficient to form a belief." A want of recollection of the precise amount of a bill, may exist, when the means of full information and knowledge are in the power of the defendant. He may, with a memorandum in his pocket, or with his closed books of account lying before him, truly swear that he does not recollect the precise amount of a bill, when he could not swear that he had no knowledge or information. I am entirely satisfied that the answer is a mere evasion of the provisions of the Code, and that the defendant has no real defence to this part of the plaintiffs' demand. This conviction is confirmed by his subsequent offer to permit judgment to be taken against him for the exact sum claimed in this count of the complaint.

The plaintiffs are therefore entitled to judgment upon this part of the complaint, on the ground of the frivolousness of the answer.

NOTE.—Since writing the above, my attention has been called to the case of *Mier vs. Cartledge*, (8 *Barb.* 75), in which the general term reversed the decision at special term, and determined that a motion can not be entertained to strike out an answer *verified* according to the Code. Although contrary to my previous convictions, I cheerfully concur in the conclusions of that case.

## SUPREME COURT.

PURDY agt. CARPENTER &amp; FERRIS.

The Code does not authorize a *general demurrer*.

The question arises whether a demurrer to a complaint stated in the words of the Code (§ 144, sub. 6), "*That the complaint does not state facts sufficient to constitute a cause of action*" is a general demurrer? *Held*, that it is nothing else; and is consequently unauthorized.

(BARCULO, *Justice*—gives the reasons; and reviews the case of *Swift agt. De Witt*, 3 *How. Pr. R.* 280, and *Durkee agt. the Saratoga and Washington Rail Road Co.*, 4 *id.* 226, which hold the other way. *Glenny agt. Hitchins*, 4 *How.* 98, agrees with this case.)

It is not necessary to aver express malice, or want of probable cause in a complaint for libel. These points belong more properly to the *onus* and *measure of proof* than to the form of the pleadings.

*Dutchess Special Term, February 1852. Demurrer to Complaint.* The plaintiff sets forth in his complaint that he is a trustee of a school district in the county of Westchester, and that the defendants, in a written application to the superintendent of common schools, to remove the plaintiff from his office, composed, signed and published "falsely, wickedly and maliciously," "a certain false, scandalous, malicious and defamatory libel," imputing to the plaintiff the guilt of having embezzled moneys coming into his hands as trustee for the purpose of building a school house.

The defendants demur, and "specify the following ground of objection to the complaint, to wit: that the said complaint *does not set forth facts sufficient to constitute a cause of action.*"

NELSON & COFFIN, *for Plaintiff.*

FERRIS & FROST, *for Defendants.*

BARCULO, *Justice*.—Two or three instances of this general form of demurring have been before me lately; and they have always struck me as being imperfect, and inconsistent with modern notions of good pleading. But, as many questions of practice are now involved in doubt and uncertainty, I have forborne to record my impressions until they could be confirmed by a proper examination of the subject. Having now looked carefully through

the provisions of the Code, and all the reported cases touching the question, my conclusion is that this mode of demurring ought not, and can not, consistent with the Code, be permitted to prevail. For this opinion, the following reasons are assigned:

1. In the *first* place, under the former practice both here and in England, *general* demurrers were prohibited by the rules of the courts. Our rules of 1847 required the party demurring to "briefly but plainly specify the objections in matters of substance as well as those of form upon which he intends to rely on the argument" (*Rule 82*). By the *Regulae generales* of Hilary term, 1833, the English courts require that some matter of law intended to be argued shall be stated in the margin of the demurrer before it is signed by counsel.

2. This demurrer is nothing more nor less than a *general demurrer*. It simply states that the "complaint does not set forth facts sufficient to constitute a cause of action." This is precisely equivalent to the old formula, "that the said declaration and the matters therein contained, in manner and form as the same are above set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant."

3. The question then arises, whether the Code has restored the general demurrer, which had been virtually abolished for good and sufficient reasons. Section 144 declares *when* the defendant may demur, and section 145 declares *how* he shall demur; viz. by *specifying* distinctly the grounds of objection to the complaint. The former provides, among other things, that a demurrer will lie, when it appears upon the face of the complaint "that the complaint does not state facts sufficient to constitute a cause of action." But it is no where provided that a simple repetition of this clause shall be deemed a *specification* of the grounds of objection. On the contrary, it is obvious, from a consideration of the context, that such could not have been the intention of the code makers. Can any one suppose that a demurrer for want of proper parties, would be good, if it should merely state, in the language of the fourth subdivision, "that there is a defect of parties"? Or will it be contended that the defendant specifies the grounds of demurrer, under the fifth sub-

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Purdy agt. Carpenter and Ferris.

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division, by simply saying, "that several causes of action have been improperly united"? Clearly not. He must, in the one case, distinctly state in what respect there is a defect of parties; who ought to be added as plaintiffs or defendants. And in the other case, he would be required to point out the several causes of action, and show how they were improperly joined. The same reasoning is, in my judgment, applicable to all the previous subdivisions. Now, if it be true, that, in regard to the other subdivisions of section 144, or any of them, it is not a sufficient specification of the grounds of objection, to adopt the language of the statute, I am at a loss to conceive why such a construction should be put upon the last subdivision; especially when the consequence is, to restore the old general demurrer. It seems to me quite plain that the sections under consideration, intended to preserve the former rule requiring the party demurring to "briefly, but plainly, specify the objections upon which he intends to rely on the argument."

Again, if this mode of demurring is to be tolerated, section 145 becomes a dead letter. For the demurrer now before us does not in any sense, *distinctly specify* the grounds of objection to the complaint. Instead of being *specific*, the objection is *as general* as it is possible for language to make it. It does not afford us any accurate information. The defendants say simply, that the complaint is bad in substance. But it may be bad for many reasons. What are they? Is it bad because the matter is not libelous in its terms? Or because the publication is not sufficiently averred? Or is it for want of proper innuendoes or averments to point the libelous matter? No one can tell what the defendants are aiming at, until the case comes on to be argued. The plaintiff gropes in the dark until his adversary chooses to enlighten him. It is doubtful whether one lawyer in ten, upon this complaint and demurrer, could conjecture the real ground which the defendants rely on. I am free to confess, that after this case was submitted to me, without argument or points, except a rather miscellaneous brief, I was unable to ascertain what was the real ground of demurrer, until I had written to the attorneys, when I was informed by one that the complaint was supposed to be bad because it did not aver *express malice!* and by the other, that



the defect consisted in not alleging "want of probable cause." This is, to my mind at least, quite a sufficient illustration of the impropriety of permitting such general pleading. I think the defendants should have stated the ground in the demurrer, to apprise the opposite party, and give him an opportunity, if he thought proper, of moving it as frivolous; or amending, if he considered it necessary. The whole spirit of the Code is hostile to such pleading; and common sense condemned it long ago.

I am aware that two, at least, of my brethren, for whose opinions I entertain the highest respect, have given these sections a different construction (see the opinions of Justice GRIDLEY in Swift agt. DeWitt, 3 *How.* 280, and of Justice WILLARD in Durkee agt. The Saratoga and Washington Rail Road Co., 4 *How.* 226). I would be very reluctant to differ with these learned judges upon any general legal principles; but in our efforts to construe the Code and reduce it to some sort of consistency, it is not, and ought not to be, surprising, that we should occasionally entertain different views. And as Justice SILL in Glenny agt. Hitchins (4 *How.* 98), has taken the other side of the case, as well as some of the local judges of the city of New York, I feel at liberty as yet to consider it an *open question*.

The reasons assigned by the two learned judges whose opinions I am dissenting from; as I understand them, are these:

1. The Code authorizes this mode of demurring.
2. There are many cases where a party can not specify more particularly the grounds of objection, and if he could it would lead to *prolixity*.
3. The objection is not waived by answering over.

In regard to the first of these reasons, I have already incidentally answered, it, by showing that this demurrer does not *specify* any thing, nor give any information except that given by an old fashioned general demurrer; and that section 145, by adopting the substance of the old rule abolishing general demurrers, precludes the idea of a return to them. To refer to the sixth class can not be deemed a specification; for it is only saying that the defendants do not rely upon the others, which, for the most part, contain only such matters as could be reached by special demurrer.

With reference to the second reason, it is sufficient to say, it lay with the same force against rule 82 which we adopted in 1847, and to all rules which require demurrers to be special. But I am unable to conceive of a case where the party can not more fully specify his cause of demurrer. The counsel *must* specify them on the *argument* and in his *points*; and if he can do it *then* he can in his *demurrer*. Nor does it necessarily lead to prolixity. The points can be, and should be, concisely stated. Nor do I recollect that we had any of these supposed difficulties, while the practice of requiring all demurrers to be special prevailed. It is not a new system I am contending for, but one that has been tried and which worked well; and I am unwilling to abandon it without cause.

To the third reason, that this general demurrer is sufficient under the sixth class, because *the objection is not waived by answering over*, we make a similar answer. The law is not changed in this respect. If, under the old system, the declaration did not contain a cause of action, it was no waiver to plead and go to trial; for even after verdict the court would *arrest the judgment*, and the plaintiff might be nonsuited at the circuit, or a writ of error would lie.

I recollect that at the Richmond circuit in April last, a plaintiff who had brought an action against a town, for damages sustained by reason of a defective bridge, was nonsuited on the ground that the action would not lie, although he offered to prove all that was set forth in his complaint. Upon the same principle we have recently, at a general term in this district, reversed a judgment obtained after trial and verdict at the circuit, in an action brought by a tax payer against a town, to recover moneys illegally assessed and collected of him by way of tax, although the point was not raised at the circuit nor presented by the exceptions. These decisions, however, were not based upon the Code, but upon ancient principles of the common law. In this respect, as in most of its valuable parts, the Code is a mere affirmance of well established legal principles. For, although some defects were waived by pleading, and others cured by verdict, it never was the law, that a declaration, bad in substance, that "did not state a cause of action," could ever be made good

by any act of the defendant, or be capable of sustaining a judgment in any stage of the litigation. And yet we know that for many years, both in England and in this state, the legislatures and the courts have been devising means to restrict and prevent general demurrers in consequence of their tendency to increase and protract litigation. And while the Code clearly *permits*, if it does not require us, to adhere to that which we all deemed a salutary rule heretofore, I can see no good reason for retrograding to the condemned system of general demurrers.

II. But, if the causes were properly assigned, this demurrer could not be sustained. For it is not necessary to *aver* express malice, or want of probable cause, in a complaint for libel. The point relates rather to the *onus* and measure of proof, than to the form of the pleadings. The reported cases on this subject recognize three classes of libel suits. The *first* comprises those cases where the matters alleged to be libelous, are *absolutely privileged*; in which it is held that an action will not lie, however malicious or unfounded the charge may be. An instance is found in *Garr vs. Selden* (4 *Comst.* 91), where the libel was contained in a pertinent affidavit made and used to resist a motion in a pending suit. So also, members of the legislature, judges, jurors, counsellors and witnesses, while acting within the line of their duty, are absolutely protected. The *second* class includes the cases where the publication was made when the defendant had some *just occasion* for speaking of the plaintiff, and is, therefore, so far privileged, that an action can not be maintained without express malice being shown on the trial. This embraces numerous cases where complaints are made through the proper channels to obtain redress, and where the communication is made in answer to proper inquiries, &c. in which good faith is presumed, until the contrary is made to appear. The case of *Washburn vs. Cooke* (3 *Denio*, 110), is an instance. The *third* class relates to ordinary cases, where no proof of malice is required, beyond what may be inferred from the injurious nature of the accusation. In the first class, the protection is *absolute*; in the second *prima facie*; and in the third, nothing at all.

Now, according to the reasoning of the defendant's counsel,

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the present case comes within the second of these classes. Admitting this to be so, it is quite obvious that the averments in the complaint are sufficient. If such matters are proper to be pleaded they must be set up as a defence, as is shown by the case of *O'Donaghue vs. M'Govern* (23 *Wend.* 26). But it is not necessary to plead them at all. If, upon the trial, it appears that the publication was made on a just occasion, the burden will thereby be thrown upon the plaintiff, of proving express malice; and then the question of probable cause may be enquired into. For in such cases the jury are to be satisfied that the defendant "did not act honestly and in good faith, but intended to do a wanton injury to the plaintiff."

Judgment for the plaintiff, with leave to the defendant to answer within twenty days, on payment of costs.

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### SUPREME COURT.

CHUBBUCK agt. MORRISON AND OTHERS.

A county judge has no authority to make an order staying proceedings in an action pending and triable in another county. (*The views expressed on this point in Peebles agt. Rodgers*, 5 *How. Pr. R.* 208, not concurred in.)

No judge has the right arbitrarily, to make an ex parte order staying proceedings in an action for a given period, or twenty days (§ 401). The stay should always be, until the party obtaining it can make some other application for relief.

*Albany Special Term, March 1852. Motion to set aside judgment and subsequent proceedings.* An issue of fact having been joined in the action, it was referred and noticed for trial before the referee on the 3d of March. The place of trial stated in the complaint is Saratoga county. The defendants reside in Rensselaer county. On the 2d of March the defendants' attorney, upon the usual affidavit for that purpose, gave notice of a motion for a commission to examine a foreign witness. With the papers for the motion, he also served an order, granted by the county judge of Rensselaer, in the following words: "Let the plaintiff's



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proceedings be stayed twenty days upon serving the foregoing papers in this action. Troy, 2d March 1852. Ch. C. Parmelee, Rensselaer County Judge." The notice of motion was for the last Tuesday of March.

The plaintiff's attorney disregarded the order staying proceedings, and proceeded to trial, and having obtained the report of the referee, perfected a judgment on the same day. The defendants move to set aside this judgment for irregularity.

E. F. BULLARD, *for Plaintiff.*

J. A. MILLARD, *for Defendants.*

HARRIS, Justice.—Two questions are presented for decision upon this motion. 1. Whether the county judge of Rensselaer had authority to make an order staying proceedings in an action pending in Saratoga county; and 2. Whether, if he had such authority, he, in fact, made an order which would have that effect.

By the 401st section of the Code, it is provided, that every motion made *upon notice*, must be made in the district where the action is *triable*, or in a county adjoining that in which it is *triable*. But, according to the provisions of the Code, as amended in 1851, *any action* may be tried *in any county*. The plaintiff *in any action* may designate *any county* as the place of trial, and unless it be changed in the manner provided by the 126th section, the place designated will remain the proper place of trial. What then is meant by the district or county in which the action is triable, as those terms are used in the Code? Clearly it was not intended that the motions, for which the 401st section provides, might be made any where in the state, and yet this would be the effect if the terms in question are construed to mean the district or county in which the plaintiff, when bringing his action, might elect to locate the trial, or to which, afterwards, the court might be induced to change it. These terms, I suppose, are to be understood to mean the district or county within which, unless subsequently changed by order of the court, the trial of the action is to be had. Thus, it is provided that where an action is triable in the first judicial district, a motion in that action must be made there. And yet every action may be tried in the first

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district and no action is, of necessity, triable there, more than in any other county or district. This provision is obviously intended to apply to those actions in which the city and county of New York has been designated as the place of trial, and in which such place of trial has not been changed. As motions in such actions must be made in the first judicial district, so motions in other actions must be made within the district in which the county designated as the place of trial, or, if the place of trial has been changed, the county to which it has been so changed, is situated, or in a county adjoining such place of trial. In short, the terms "county where the action is triable," mean nothing more nor less than the *place of trial*.

In respect to that class of orders which may be made out of court and without notice, it is declared that they may be made by any judge of the court, *any where—and also* by a county judge of the county where the action is triable. In other words, the county judge of the place of trial may make orders of this description. If the authority of the county judge is not to be thus restricted, what other limit shall be given to his power? If it was intended that he should have jurisdiction to grant any order which might be made by a judge of the Supreme Court at chambers, why provide at all for the exercise of this power by the county judge of a particular county? Why not rather provide that these orders might be made by any judge of the court, *or county judge* in any part of the state? By a familiar rule of interpretation, the express authority given to the county judge of the county where the trial is to be had, to grant such orders, is an implied prohibition of the exercise of such power by any other county judge. It operates to restrict the general powers conferred upon county judges by the 29th section of the judiciary act, and the 403d section of the Code. With the most profound respect for the venerable judge who delivered the opinion in *Peebles vs. Rodgers* (5 *Howard*, 208), I can but think he has fallen into an error, when he says, "There is nothing in any part of the Code which takes away any of the powers given to county judges by the 29th section of the judiciary act, except that part of section 401, which enacts that "motions must be made within the district in which the action is triable, or in a county adjoining that in

which it is triable." I suppose, and I think I have shown, that the subsequent clause in the same section, which confers upon the county judge of the county where the action is triable, the powers of a judge of the Supreme Court, in certain cases, operates to exclude other county judges from the exercise of the same powers. This error, if error it be, has led the same distinguished judge to the conclusion that, at any rate, a county judge residing in a county adjoining that designated as the place of trial may make a chamber order in the action. This, unless I have wholly misconceived the effect of the provision in question, can not be done. If any effect at all is to be given to this clause, it limits the power of granting such orders to the county judge of the county where the trial is to be had. This being so, it follows that the order upon which the defendants rely is void for the want of jurisdiction to grant it.

I think, too, the order if not absolutely void, was at least irregular, for another reason. An order to stay proceedings is only properly granted, as a means to an end. The application for it always is, or should be, founded on a case showing at least a *prima facie* right to some relief, which can only be effectually obtained by arresting the proceedings of the opposite party until the application for such relief can be properly made. No judge has a right arbitrarily to say to a party to an action that he shall suspend proceedings for a given period of time, except for the purpose of enabling the party asking for such stay to seek some other relief.

The last paragraph in the 401st section of the Code declares that no *ex parte* order shall be made staying proceedings for a longer time than twenty days. It has been quite common, I think, to understand this provision as though, instead of limiting the power of judges in making *ex parte* orders, as it does, it conferred upon them affirmative authority to stay proceedings for *twenty days*. No such authority was intended by the legislature. I think no order can properly be made, staying proceedings for any specified number of days. The stay should always be *until the party obtaining it can make some other application for relief*.

It has been supposed that where the application, on account

of which the stay of proceedings is deemed necessary, can not be made within twenty days, the requisite stay may be secured by a series of ex parte orders—that though a judge may not, without notice, stay proceedings *by any one* order for a longer time than twenty days, he may effect the same thing by a second order made before the first stay expires. This, I am aware, has, at least to some extent, been practiced. Such a course would seem to have been intended in this case. The motion for a commission was to have been made on the 30th of March. The stay would have expired on the 22d of the same month, so that, without some further order, the plaintiff would have been at liberty to proceed with the action before the defendants could have moved for their commission.

The correct practice in all such cases is, not to stay proceedings in any case, for any given number of days, but to stay until the application, on account of which the stay is sought can be made—or, if such application can not be made within twenty days, then to make an order requiring the opposite party to show cause, either before the judge granting the order, or some other judge, or the court, according to the circumstances of the case, at some specified time, within twenty days, why proceedings should not be stayed until the application for relief can be made; and, in the mean time, staying such proceedings. Every such order contemplates some further application by the party obtaining it to be made at the time when it is, by its terms, to expire. It is no unusual thing to see an order to stay proceedings for twenty days, when the motion on account of which the stay was granted is to be made within a shorter period. All such orders, if not absolutely void, are clearly irregular. A judge has no more right to suspend the proceedings in an action for twenty days, when nothing is to be done at the expiration of the order, than a court has to pay to a party that he shall suspend proceedings for a month or a year and then be at liberty again to proceed. Such orders are only proper when and so far as they are auxiliary to the principal relief sought by the party obtaining them. I will not say that such an order as that in question could safely have been disregarded as a nullity, if granted by a judge who had authority to make an order in the case, but such an



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order was certainly irregular, and might have been set aside on that ground.

The plaintiff's proceedings have been regular, but as the defendants swear to merits, they may have the cause retried before the referee, and for that purpose may have an order for a commission to examine the witness, with a stay of proceedings until the return of such commission. The judgment and execution, if any has been issued, are to stand as security. The defendants must also pay the costs of opposing this motion.

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## SUPREME COURT.

CAMERON AND MCKAY agt. YOUNG.

The remedy heretofore given by *scire facias* to obtain execution of a judgment, is superseded by the provisions, for an *action* therefor under the Code.

The 428th section of the Code says, "The writ of *scire facias*, the writ of *quo warranto* and proceedings by information in the nature of *quo warranto*, are abolished, and the remedies, heretofore obtainable in those forms, may be obtained by civil actions, *under the provisions of this chapter.*" But there is no provision, nor a word said about an action in lieu of a remedy by *scire facias*, in the whole chapter. Of course, the provision has to be sought out and sustained from other parts of the Code.

*Erie Special Term, December 1851.* George Truscott recovered a judgment in this court against the defendant. In July 1851, Truscott died. By his last will, &c. he appointed executors who proved the will and took upon themselves its execution. They then sold and transferred the judgment to the present plaintiffs who sued out a writ of *scire facias* to obtain execution of the judgment. The defendant moves to set aside the *scire facias*, upon the ground that this remedy is abolished by the Code.

TORRANCE & TALCOTT, *for Defendant.*

GEO. W. HOUGHTON, *for Plaintiffs*, referred to the *Code*, sections 428, 376, 377, 468, 121-2, 71, 111, and to *Foster's Writ of Scire Facias*.

MARVIN, Justice.—The counsel for the plaintiffs insists that the Code has provided no remedy in a case where the plaintiff dies after judgment and before execution, and that therefore by section 468, the practice heretofore in use, may be adopted, so as to prevent a failure of Justice. This position is undoubtedly correct, unless the right to have execution of the judgment may be prosecuted *by action* in the manner provided by the Code. In my opinion the right may be so prosecuted, and there is no necessity of resorting to the writ of *scire facias* heretofore in use. It was conceded on the argument that the defendant resided in this state and that he had been personally served with the writ.

By section 69 of the Code, the forms of all actions and suits theretofore existing were abolished, and one form of action for the enforcement or protection of private rights and the redress of private wrongs, denominated a civil action, was substituted.

By section 468 all statutory provisions inconsistent with the Code are repealed, and all *rights of action* given or secured by existing laws may be prosecuted in the manner provided by the act. It is also provided in this section, that if a case shall arise in which an action for the enforcement or protection of a right, &c. can not be had under the act, the practice heretofore in use may be adopted so far as may be necessary to prevent a failure of justice. It is claimed that the present case comes within the saving clause of this section; that a proceeding by *scire facias* to have execution of a judgment was never an *action* and can not be regarded as an action, and that, therefore, it is not included in the remedies given in the Code; that it is a judicial writ to continue the former suit and to have execution of the judgment.

This was undoubtedly the nature and object of the writ. It was given by statute to avoid the necessity of an action of debt upon the judgment, where there had been a delay beyond the time allowed by law, in suing out execution. In *Foster's Writ of Scire Facias*, p. 11, it is said, "In all cases where the writ of *scire facias* is required either to revive a previous judgment above a year old, or where a person has become interested in the suit who was not a party to the judgment, it is a judicial writ to warn the defendant to plead any matter in bar of the execution.

and in these cases it is only a *quasi* continuation of the former suit, brought merely to revive a former judgment, and is then properly called a writ of execution" (see also *Tidd's Pr. Scire Facias*).

The proceedings by scire facias have many of the characteristics of an action. The writ contains a declaration; the defendant may answer it by demurrer or plea. Issues may be joined and tried and judgment follows, and *Tidd* says it is considered in law an *action* (see also *Co. Litt.* 290 b). BULLER, J. (2 *T. R.* 45), says, "It has been held in a variety of cases that a scire facias is an *action*"; and FOSTER (*p.* 13) says the writ in all cases is in the nature of an action, because the defendant may plead to it; for whenever the defendant may plead to any writ, whether original or judicial, it is in law an action, and though to revive a judgment, it is a judicial writ to continue the effect of, and "have execution" of the former judgment; yet it is in the nature of an action, because the defendant may plead any matter in bar of the execution upon the judgment.

Our courts have often recognized the scire facias as a new action.

In *Gonnigal vs. Smith* (6 *J. R.* 106), the court held that the sci. fa. was a new action and required a new warrant of attorney. In *Murphy vs. Cochran* (1 *Hill*, 342), it was held, in construing the word "scire" in a statute, that a scire facias was a suit or action.

The definition of an action given in the Code is sufficiently comprehensive to include the proceeding by scire facias to have execution, &c. It is a proceeding in a court of justice by which the plaintiff prosecuted the defendant for the *enforcement* of a *right*. If the judgment has not been satisfied, it is the right of the representatives of a deceased judgment creditor to have satisfaction thereof by execution.

A scire facias to revive a judgment, or rather warning the defendant to show cause why the plaintiff should not have execution thereof, being regarded as an action, sections 69 and 468, without the saving clause, are applicable to the case; and the remedy by a writ of scire facias, in a case like the present, no longer exists.

I can see no difficulty in resorting to the general remedy by action given by the Code. The summons may be in the usual form, and the complaint in stating the facts constituting the cause of action, will state the same facts substantially, which were formerly stated in the writ of scire facias. The proper relief will then be demanded, viz: that the plaintiff have execution of the judgment. The defendant, by answer can make any defence which he was allowed to make by plea to the writ or the declaration contained in the writ. The judgment in effect will be the same as under the superseded practice, and the lien upon land will be preserved. I see nothing in the system of the Code conflicting with this practice. Section 71, prohibiting an action upon a judgment rendered in certain courts between the same parties, has no application. The parties to this action are not the same parties as those to the judgment.

No inference, adverse to the views here taken, can be derived from sections 376 and 377.

I have not referred to section 428, though it was much considered by counsel upon the argument. I prefer to place my decision upon the grounds already stated, without reference to this section, by which it is declared that the writ of scire facias, the writ of quo warranto, &c. are abolished, and the remedies heretofore obtainable in those forms, may be obtained by civil action under the provisions of *this chapter*." Had the language been *this act*, instead of "this chapter," there could have been no question as to the direct abrogation of the writ of scire facias to revive a judgment, as I have already shown that the general remedy by action is suitable and sufficient. But on looking into the *chapter*, in which section 428 is contained, there are no provisions applicable to a scire facias to revive a judgment, hence it was contended that the legislature did not intend to abolish the writ in such a case.

No such inference can be drawn from this fact. The most that might be claimed is, that the legislature did not have in contemplation the writ of scire facias to revive a judgment. This would not affect the other provisions of the Code to which I have referred and upon which I found my opinion.

Motion granted, but without costs.



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Brown agt. Orvis.

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## SUPREME COURT.

BROWN agt. ORVIS.

The general rule in pleading a defence, in an action of *slander or libel* before the Code, was that the matter alleged in the (plea or) answer must be such as constituted a complete defence to so much of the (declaration or) complaint as it professed to answer. The Code (§ 165) has made one exception only to this rule, that is in case *justification* is pleaded and *not otherwise, mitigating circumstances* may be alleged. So that in case of failure in making out a justification, the mitigating circumstances may nevertheless be proved. (*The doctrine of the case of Graham agt. Stone, ante page 15, fully approved*). But allegations in an answer which would not be allowed to be proved, even in mitigation of damages, should be stricken out as irrelevant. A charge of dishonesty in the capacity of a merchant's clerk, is of itself actionable.

*Motion to strike out irrelevant matter.* The action is for slander. The plaintiff alleges that, being a clerk for the mercantile firm of Newcomb & Warren in the city of Troy, the defendant spoke and published of him and of and concerning him, as such clerk, the following false and scandalous words: "He is dishonest and is not to be trusted about the store. He has taken things, while a clerk for Newcomb & Warren, and has not accounted for them. He has taken two barrels of Newcomb & Warren's oil and sold them and got the money and put it in his pocket and rendered no account for them."

The complaint states three other causes of action, each substantially the same, and to the effect that the defendant had said that the plaintiff had been caught stealing oil.

The defendant in his answer, first denies each and every allegation in the complaint. He then states, in respect to the first cause of action stated in the complaint, that the plaintiff while a clerk for Newcomb & Warren, did take two barrels of their oil, sell the same, and that he received the money therefor and put the same in his pocket, and did not render any account thereof. This part of the answer the plaintiff moves to strike out.

The defendant then proceeds to state that upon taking an inventory of the goods in Newcomb & Warren's store for the purpose of a sale, it was discovered that the plaintiff had sold two bar-

rels of oil, and received the money for the same without accounting for it; and that upon being charged therewith he admitted that he had so done. It is also stated that in making the inventory, the plaintiff had fraudulently inserted therein a large quantity of black lead (an unsaleable article) belonging to himself; that about the same time he had taken from the store a quantity of gin, without charging it to himself, or rendering any account therefor; that the goods contained in the inventory made by the plaintiff fell short of the amount stated in the inventory, about \$100. Various other allegations of misconduct on the part of the plaintiff are set forth in the answer, none of which have any reference to the allegations in the complaint. All this part of the answer the plaintiff moves to strike out as irrelevant.

J. PIERSON, *for Plaintiff*.

H. P. HUNT, *for Defendant*.

HARRIS, Justice.—In *Graham vs. Stone* (6 *Howard*, 15), Mr. Justice JOHNSON, in an exceedingly well considered opinion, has stated the true rule applicable to the pleading of matter in mitigation of damages in an action for libel or slander. The general rule is now as it was before the adoption of the Code, that matter alleged in an answer must be such as constitutes a complete defence to so much of the complaint as it professes to answer. To this rule the 165th section of the Code has made one exception. Where the defendant insists, in an action for libel or slander, that what he is alleged to have written or spoken, or some part thereof is true, he may, in connexion therewith, *and not otherwise*, allege mitigating circumstances, so that in case, upon the trial, he should fail in proving his justification, he may not be prevented as he would have been under the former practice, from giving evidence to reduce the damages. When there is no justification, the Code has made no change in the rules applicable to the pleading or proving of mitigating circumstances.

In this case, the defendant has alleged matter which he claims to be a justification of the charge in the first cause of action stated by the plaintiff. Whether or not it amounts to a justification, is not for me to decide upon this motion. If the plaintiff thinks

the matter so alleged does not constitute a justification he may demur and thus have its sufficiency determined. Upon the principles to which I have referred, the matter in mitigation would abide the fate of the justification, upon demurrer; for, as we have seen, it can only stand, as a pleading, when connected with matter of justification.

Assuming, then, for the purpose of this motion, that the defendant has alleged matter which justifies the charge stated in the first cause of action, it follows that so far as he has alleged, in mitigation of damages, facts which it would, under the rules applicable to that subject, be competent to prove, for that purpose, upon the trial, the answer is authorized by the present rules of pleading. If the answer contains any thing more, it ought not to be there, and should be stricken out.

The cause of action to which this part of the answer is intended to be applied, consists in a general charge of his dishonesty, in connexion with particulars, which may or may not be construed to impute to the plaintiff a criminal offence. The charge of dishonesty, being made against the plaintiff in his capacity of a merchant's clerk, is itself actionable. In respect to this charge alone, therefore, it is competent, by way of mitigation, if not justification, to show any facts which tend to furnish a ground for making the charge. For this purpose, I think the defendant might properly allege, and, if he can, prove the various dishonest facts set forth in his answer; such as the sale of two barrels of oil without accounting for the proceeds—the taking of five gallons of gin for his own use, without making any entry thereof, or accounting for it; and the attempt to impose upon the purchasers of his employers' stock of goods his own unsaleable property, as constituting a part of the stock.

But there are other allegations in the answer which the defendant would not be allowed to prove, even in mitigation of damages. They may show, and if true, they do show that the plaintiff had been guilty of improprieties and was unworthy of his situation, but they have no proper connexion with the charges which are the subject of this action. Of this description are the allegations that the inventory taken by the plaintiff fell short in weight and value; that the plaintiff improperly withheld the

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recipes belonging to the store; that he adulterated medicines and attempted to divert customers from the store in which he was employed to other rival establishments. These are facts which the defendant would not be allowed to prove, and, of course, they ought not to be alleged in the answer. That part of the answer, therefore, which embraces these allegations, beginning with the words "said Cook abandoned," in the 7th folio, must be struck out. As to the residue of the matter included in the motion, it must be denied. Neither party having succeeded wholly, neither party is entitled to costs.

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## SUPREME COURT.

### BANK OF BRITISH NORTH AMERICA agt. SUYDAM, JR. AND OTHERS.

Where a complaint, in the nature of a creditor's bill, against the original debtors and their assignees, seeks to set aside the assignment made for the benefit of creditors; it is not necessary to make *all the creditors parties defendant*. The assignees, in such case, represent all the creditors interested in the trust. It would be otherwise, if the action was to establish and carry out the assignment, or for portions of the trust fund.

Where a judgment creditor alleges that the debtors, combining with the assignees, have endeavored, fraudulently to defeat his lien, by one of them executing a mortgage to one assignee and all of them an assignment of portions of their property to another, and prays that the securities so given may be declared void, as made with intent to hinder, delay, &c., and that a receiver be appointed, &c., *Held*, that separate causes of action are not united. The complainant stands on the ground of holding by virtue of his judgment and execution, a lien on all the real and personal estate of the judgment debtors, whether joint or separate.

If facts sufficient to constitute a cause of action for equitable relief are stated in a complaint, and a series of interrogatories, after the manner of a former creditor's bill of discovery, are also inserted. These latter matters can not be reached by *demurrer*. Irrelevancy is remedied by *striking out*.

*New York Special Term, February 1852.* This is a bill filed by a judgment creditor of the late firm of Suydam, Sage & Co. against the members of the firm as the original debtors, and Ferdinand Suydam, the elder, and B. R. Robson, in whose favor the



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firm, or its members had given certain preferences by assignment and mortgage.

The complainants pray that the securities so given may be declared void, as made with intent to delay, hinder and defraud; that an account may be taken, a receiver appointed and an injunction issued.

Demurrers, all substantially the same, have been put in by the defendants, in which a great variety of objections are raised, resolving themselves, however, so far as they can be noticed on this argument, into the three following:

- 1st. That there is a defect of parties defendant.
- 2d. That several causes of action have been improperly united.
- 3d. That the complaint does not state facts sufficient to constitute a cause of action.

WM. C. BARRETT, *for Plaintiffs.*

GEO. R. J. BOWDOIN and J. LAROCQUE, *for Defendants*

ROOSEVELT, Justice.—The *first* objection rests on the ground that the assignment, made to give certain preferences to Robson and the elder Suydam, also provided secondarily for other creditors, and that those creditors are not made parties to this suit.

Had this been a suit to establish and carry out the assignment the objection would have been well taken. Each separate creditor can not bring a separate suit for his portion of the trust fund, thus compelling the assignee to account over and over again. Whoever sues must sue on behalf of all, so that the accounting once had, may conclude all. Not so where a creditor seeks to set aside an assignment. In that case the assignee represents all the creditors interested in the trust. His defence is their defence; in the same manner as an executor represents the estate entrusted to him. As a matter of convenience as well as principle, the courts have held in such cases that all the creditors need not be made parties. The case of *Grover vs. Wakeman* (4 *Paige*, 23), and again reported on appeal to the Court of Errors (11 *Wend.* 187), settles this question.

Next, as to multifariousness (§ 144, 167). The meaning of the Code, in the sections relating to this subject, is that you shall not unite incongruous matters, or incongruous parties, in the

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same action. As, for instance, a promissory note with an assault and battery, a claim arising out of real estate with one depending on a libel, a claim against A, on a bill of exchange made by him, with a claim against B, on a distinct and separate bill made by him.

Here, however, the claim is one. The plaintiffs' judgments are a debt of record. The law implies a covenant or contract to pay a judgment, and on this ground an action of debt could be maintained upon it. Any number of such causes, therefore, may, in the language of § 167, "be united in the same complaint." They all "arise out of contract, express or implied." But, it is said, admitting the causes of action to be homogeneous, they do not "affect all the parties in the action"; that Mr. Robson, one of the defendants holding a separate mortgage, given by one of the partners on his individual property, has no interest in the matters in controversy.

The counsel for the defendants seem to overlook the actual position of this case. The complainants stand upon the ground of holding, by virtue of their judgments and executions, a lien on all the real and personal estate of the judgment debtors, whether joint or separate.

They allege that these debtors, combining with the other two defendants, have endeavored fraudulently to defeat this lien, by executing a mortgage on part of the property to one, and an assignment of other portions to another. Had they merely made the debtors parties, we should have been told that it was an attempt to pass upon the rights of absent claimants without a hearing, and the bill must either have been dismissed for want of parties, or have stood over to bring them in. The case is analagous to that of a mortgage foreclosure on numerous lots, some, owned by the mortgagors jointly, and some separately. Suppose the mortgagors, after executing the mortgage, should sell one of the lots to A, another to B, and so on, through the alphabet; could either of these grantees say that he was not a proper party to the foreclosure, because, although he held one of the lots he had no interest in the others? He is brought in, not to force him into litigation against his will, but to give him an opportunity of being heard, if he desires it. The plaintiffs' right

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is one, and is entitled to one remedy. If the debtor by judgment or mortgage chooses to subdivide the subject of the lien, he can not by so doing subdivide the lien itself. He may impose upon the creditor the burden of many parties, but the law will not allow him to subject the creditor to the further grievance of many suits. Indeed, it may fairly be inferred in the present case, that had the plaintiffs even submitted to bring several distinct suits, they would, and justly too, have been charged with multiplicity, and subjected to a motion, usual under such circumstances to compel a consolidation.

In addition to these answers to the objection we have been considering, the charge of fraudulent combination, applicable alike to all the defendants, and by the demurrers of all admitted to be true, is of itself as settled by the Court of Appeals, in the case of McCosker agt. Brady (1 *Comst. R.* 221), perfectly conclusive.

Lastly, as to the sufficiency, not of the allegations—for that by the Code is not the test—but of the *facts* stated in the complaint, “to constitute a cause of action.”

If a plaintiff shows, as is done here, a clear lien on real and personal property, which he is taking the ordinary method to enforce, and that his proceedings, thus lawfully instituted, are wrongfully impeded by fraudulent transfers, and other obstructions created by the combined action and contrivance of the defendants; such facts—and facts, for the purpose of this argument, they are admitted to be—would seem to present a very undeniable case for equitable relief. But the plaintiffs, it is said, have not set forth in their complaint the entire contents of the alleged fraudulent assignments, and have inserted a series of interrogatories after the manner of the ancient bill of discovery. These may be, and probably are, well founded objections, but they can not, under the Code, be made grounds of demurrer.

Irrelevancy is to be remedied by striking out; and this end is to be attained, not in the old formal expensive and dilatory manner of demurrer, but “*on motion* of the party aggrieved” (§ 160).

Judgment for plaintiffs, with liberty to defendants to answer in twenty days on payment of costs of the demurrers.

## SUPREME COURT.

SMITH agt. BROWN AND OTHERS.

A demurrer to the whole complaint, assigned several causes, that extended to the whole complaint; but other parts or specifications of the demurrer, alleged that certain specified portions of the complaint were redundant, immaterial and uncertain; motion to strike out the last mentioned specifications in the demurrer as irrelevant, redundant, impertinent, &c., *denied*.

*Quere*—Whether § 160 of the Code applies to demurrers?

*Franklin Special Term, February 1852.* The defendants had demurred to the complaint, and the plaintiff now moves to strike out the 3d and 6th causes of demurrer “as irrelevant, redundant and impertinent in its allegations”; also, the last cause of demurrer specified in the defendants’ demurrer, as irrelevant, redundant, impertinent, indefinite and uncertain in its specifications.

The 3d, 6th and last specifications, or causes of demurrer, assigned, were as follows:

“*Third.* That all that part of the complaint commencing with the word ‘that,’ in the 8th line of folio 16, and ending with the words ‘in their lands,’ in the third line of folio 17, is vague, uncertain and redundant”

“*Sixth.* The averments, contained in said complaint, commencing with the words ‘plaintiff says,’ in the 2d line of folio 18, ending with the words ‘ever since,’ in the same folio, are redundant, immaterial and uncertain.”

“*Lastly.* The said complaint in other respects is uncertain, informal and insufficient.”

It appeared by affidavit of the plaintiff’s attorney, that a motion by the defendants to strike out those parts of the complaint mentioned in the 3d and 6th specifications, and for the reasons mentioned in said specifications, had been made and denied.

W. W. WALLACE, *for the Motion.*

— HUTTON, *Contra.*



HAND, Justice.—The defendants contend that the passages in the complaint, specified in those parts of the demurrer, which are now under consideration, are immaterial and irrelevant; and that these assignments of causes of demurrer are only a necessary consequence. But surplusage and immaterial allegations are not demurrable, if, without them, a cause of action or defence be stated in the same count or plea (11 *East*, 65; 1 *Chitt. Pl.* 573, n.; 5 *Bac. Abr.* 414; *Gould*, 154; 2 *Sanf. Sup. C. R.* 702). Nor are immaterial and impertinent allegations, confessed by a demurrer; for what a party can not contest, he does not confess by leaving it unanswered (*Gould*, 471; 5 *Bac. Abr.* 460). Nor will a demurrer be permitted to part of a single indivisible cause of action (1 *Chit. Pl.* 577; and see *Slocum vs. Wheeler*, 4 *How. Pr. R.* 373) nor to part only of a single defence (*Cobb agt. Frazee*, 4 *How. Pr. R.* 413). Mr. Justice GRIDLEY said a party in such a case may move to strike out a demurrer (*Cobb agt. Frazee*, *supra*; and see *Rae agt. Wash. Mu. Ins. Co.*, 6 *How. Pr. R.* 21). If a plea profess to answer only a part, and in fact only answers a part of a declaration (and which is not otherwise answered), the plaintiff may have judgment; and a demurrer and joinder in such cases, discontinues the action (1 *Saund. R.* 28, n. 3; and see 2 *Ld. Raymond*, 1021). But here the demurrer professes to be, and is, in other parts of it, to the whole complaint; the first, second, fourth and fifth specifications covering the whole of it. And assigning as a cause of demurrer, that certain parts of the complaint are immaterial and redundant, does not vitiate the demurrer. Although the special cause assigned for demurring may be frivolous, the demurrer itself may be substantial (*Furniss vs. Ellis*, 2 *Brock.* 18; *MARSHALL*, C. J.). It seems to me, those parts of the demurrer to which objection is now made, may be considered as merely parts of the same demurrer. No precise form of words are necessary in a demurrer (1 *Chitty Pl.* 578). And there is no demurrer to a demurrer. If, after alleging that sufficient facts to constitute a cause of action are not stated, the pleader demurs to all of it for that cause, and then specifies his objections to it in parts, though perhaps rather inartificial, it will not, for that reason, be an invalid demurrer.

But, admitting these portions of the demurrer are irrelevant

and immaterial, I am inclined to the opinion that this motion can not be sustained. Perhaps, in a sense, under the Code, a demurrer may be considered as a "pleading" (§ 156); Brodhead agt Brodhead 4 *How. Pr. R.* 308). And it has been said a demurrer is a plea. But this is because the *placitum* is *nomen collectivum* (Hilson vs. Law, 1 *Ld. Raymond*, 22). In the ordinary use of the term, it is not a plea (*Gould*, 46, 460). The 160th section of the Code, authorizes the court to strike out irrelevant and redundant matter in a pleading. And no part of the record should be encumbered with useless statements or unnecessary prolixity. That would be unlawyer-like and a grievance to all concerned. And I will not say that causes specially assigned in a demurrer, contrary to fact, and therefore plainly idle, should not be expunged on motion. This probably would be so, irrespective of the Code; and a frivolous demurrer is provided for (*Code*, § 247). But where, as in this case, a demurrer, in other parts good in form and extending to the whole complaint, specifies a few sentences of the complaint as being immaterial, I do not think the 160th section was intended to apply. A joinder in a demurrer is general, so no additional issues are tendered. And the causes specially assigned, if in good faith, are hardly more than points, so far apprising an opponent of the positions upon which the party relies. If untenable, they are, of course, unavailing. And if the grounds of objection are not specified, as is the case in this last specification, it may be disregarded (*Code*, § 145). Indeed, if no grounds of objection to the complaint had been distinctly specified, it seems the whole demurrer might have been disregarded (see the reasoning of the judges in *Durkee agt. S. & W. R. R. Co.* 4 *Howard*, 226, and *DeWitt vs. Swift*, 3 *id.* 280; *Code*, § 145; 22 *Wend.* 630).

And again, if those parts of the complaint specified, are in fact immaterial and irrelevant, upon which I now give no opinion, the plaintiff should not complain because they are specified as such in the demurrer.

Motion denied.

## SUPREME COURT.

## MOREWOOD AND OTHERS agt. THE CORPORATION OF NEW YORK.

A *street commissioner's notice* is not necessary or required, at all, where the corporation of New York city order and direct the *pitching and paving* of the *streets, side walks, &c.* of the city to be done and assessed to the owners interested. The law gives the *corporation* entire control and discretion in the matter.

Where *fraud* is alleged, in doing the work, through the combination of the *contractor* with the *inspector*, and there has been a hearing of the matter, by all parties, before a committee of the common council, and no *appeal* or *certiorari* taken from their determination, and that determination having been confirmed, the *corporation* can not be reached, collaterally, by *action* for such alleged fraud, nor the proceedings be disturbed.

Where the *assessors*, appointed by the common council, to apportion and assess the expenses of such work, to the several persons interested, *all* certify the assessment to the Common council, and it is thereupon *ratified*, it is "*binding and conclusive.*" It is then too late to raise the objection that *all* the assessors did not literally *act*.

*New York Special Term, January 1851.* This is a complaint arising out of an assessment for the expense incurred by the corporation in flagging the sidewalks of the plaintiffs in 17th street, between the 5th and 6th avenues.

The plaintiffs ask that the assessment be declared void; that all proceedings to collect the sums assessed be perpetually stayed by injunction; and that they be relieved from any payment on account of the work, and their lots discharged from the apparent lien created by the proceedings, or (to use their own language) from "the cloud" which has been made to overhang their title, and which embarrasses them in the disposal of their property.

The main grounds of complaint are, 1st. That the plaintiffs were "deceived and misled" by the street commissioner's notice, calling for objections to a proposition for flagging only four feet in width, to which they had no objection, and then, without further notice, changing the plan into one of fourteen feet, to which they had great objections.

2d. That the work was badly done, and not in conformity with the contract; that the price was unreasonable for such work; that

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there was collusion between the contractor Wilson, and Brooks the inspector; and that the certificate of the latter, that the contract had been fulfilled, was false and fraudulent.

3d. That one of the assessors was, without law, removed, and another put in his place.

4th. That only one of the assessors, instead of the three, acted in making the assessment, although the whole number signed the return.

5th. That the common council confirmed the assessment with full notice that Brooks's certificate was false, and that the contract had not been complied with on the part of the contractor.

C. T. CROMWELL, *for Plaintiffs.*

H. E. DAVIES, *for Defendants.*

ROOSEVELT, Justice.—Some of these, it is not to be disguised, are grave charges.

As to the first, the street commissioner was certainly very remiss in misleading the parties by the notice he published. But the law required, strictly, no notice at all. The corporation, by the very terms of the law, were made the judges of the necessity or expediency of "ordering and directing the pitching and paving of the streets of the city," and divers other matters relating to the health and comfort of its inhabitants. And in all cases, where they deemed it necessary for the more speedy execution of their determinations, they were authorized "to cause all such works as might be necessary for any of the purposes aforesaid, to be executed and done at their own expense, on account of the persons respectively upon whom the same might be assessed," &c.

However reprehensible, therefore, may have been the carelessness of the street commissioner, it can not invalidate the ordinance which directed the work to be done.

Next, as to the fraudulent conduct of the contractor and inspector. There is no dispute on this point as to the mere fact. There is a fair presumption, also, that these two persons conspired together to slight the work and divide the profits between them. The verdict of the jury is substantially to this effect. But the plaintiffs knew all this before the assessment was confirmed. They so admit in their complaint. They go further, they allege



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that they put in a remonstrance, and were heard before a committee of the common council; that they made out a clear case of fraud, and that one or more of the members even personally examined the premises, and saw and knew the fraudulent manner in which the contract had been executed. The committee, notwithstanding decided against interfering with the assessment, and the common council confirmed their decision.

Thus it will be seen that the parties have already once been heard before a competent tribunal. They brought forward, or should have brought forward all their objections. After full hearing, the case, most unjustly they allege, was decided against them. Still they did not appeal; they sued out no writ of *certiorari* to review the objectionable determination. Can they now collaterally call that determination in question? The court think not. Had fraud been charged on the part of the corporation itself, and not only charged but proved, the case might have presented a different aspect. Fraud vitiates even the most solemn judgments. But the plaintiffs have adduced no such proof. All they have shown is that the corporation was cheated.

Next, as to changing one of the assessors, and as to all three not acting.

The law after authorizing the corporation, in these cases, to cause the work to be done, provides for making, under their direction (§ 175, 270) "a just and equitable assessment of the expense among the owners or occupants of all the houses and lots intended to be benefited thereby in proportion, as nearly as may be, to the advantage which each shall be deemed to acquire." The word assessment is obviously used in the same sense as apportionment. To apportion the expense justly and equitably, is the end to be accomplished; and for this purpose the corporation it is further provided "shall appoint such skillful and competent disinterested persons as *they* shall or may *think proper*." No particular number is required. That, as well as the selection, is left entirely to the discretion of the common council. Before entering upon their trust, they are to take an oath "to make the estimate and assessment fairly and impartially, according to the best of their skill and judgment." There is no complaint in this case that they did not do so. The apportionment we are to

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assume, therefore, was just and fair. But it is said they did not "all act" in making it. All joined in "certifying the same in writing," to the common council. But that, it is said, was not enough. The common council, moreover, "ratified" the proceeding. But that too, it is said, did not cure the defect. And when the law declares that the assessment so ratified, "shall be binding and conclusive," these words also, it is said, mean nothing, and judicial opinions are cited to give color to the doctrine.

I am satisfied they mean more than nothing—they mean something; and as the expressed will of the legislative branch of the government, confessedly within its constitutional power, are binding and conclusive on the judiciary.

Were the question of acting or not acting, open for consideration it would appear from the evidence that all the three "persons appointed" to make the apportionment (which in these cases, it should be borne in mind, is little more than a mere operation of figures), if they did not literally *act* did certainly participate in the consultation and concur in the result. And as it is not pretended that the plaintiff suffered any injury from the alleged omissions of the assessors, the mere technical objection would be no ground for an injunction to stay the proceedings.

The plaintiffs in this case, it is conceded, have derived some benefit—their side walks have been flagged at the expense of the general tax payers—and this "expense," the law says (§ 271), shall be "a *real incumbrance* upon the houses and lots" assessed, and the repayment, with interest and costs, "enforced in like manner as if the said houses and lots were *mortgaged* to the mayor, aldermen and commonalty for the payment thereof." Is there any equity then, as between the plaintiffs and the general tax payers, in asking that this mortgage should be cancelled, without any offer or even promise to refund the amount expended, or even so much as should, upon investigation, be found to be no more than equal to the benefit received.

The preliminary injunction is dissolved, and the complaint dismissed, but without costs.

## NEW YORK COMMON PLEAS.

CHAPMAN agt. WEBB AND RAYMOND.

The last revision of the 173d section of the Code does not limit the power of allowing the amendment of a pleading or proceeding to cases where it may become necessary to *conform* the pleading or proceeding to the *facts proved*, but the court has the power of allowing the amendment at any time in the progress of the cause.

The omission of the word "*or*" in the 173d section as it now stands, was manifestly unintentional, and the last part of the section which reads "by conforming the pleading or proceeding to the facts proved," instead of qualifying the whole of the preceding part, should read "*or by conforming, &c.*" thus making it one of the cases in which an amendment shall be allowed, instead of the only case in which allegations, other than those previously provided for, can be inserted.

An amendment of a complaint, though it change the cause of action, will be allowed if the "claim" remains the same.

The cause of action is the statement of the facts upon which the party founds his claim for relief. The "claim" is the particular relief sought.

The plaintiff declared for goods sold. The answer set up that they were sold upon a credit which had not expired. The plaintiff moved to amend his complaint by averring that the goods were procured through fraudulent representations on the part of the defendant. In the original complaint he demanded judgment for \$162'87, that being the contract price of the goods. In the complaint as proposed to be amended, he demanded judgment for the *same sum*, averring that to be the value of the goods. *Held*, that within the meaning of the 173d section there was no change in the nature of the claim.

An amendment of a complaint will be allowed upon the payment of costs of motion. But if the defendant changes his defence he is entitled to the whole of his costs up to the time of amendment.

*New York Special Term, January, 1852.* Motion by plaintiff to amend his complaint.

JAMES T. BRADY, *for Plaintiff.*

J. W. GREEN, *for Defendant.*

DALY, Judge.—The principal difficulty I have experienced upon this motion arises from the change in the wording of the 173d section by the last amendment of the Code. As this section originally stood, the court was authorized at any time to allow

an amendment if it did not "substantially change the cause of action or defence." In the revision of 1849, this clause was left out, and this part of the section read "the court may at any time, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or by conforming the pleading or proceeding to the facts proved. In the revision of 1851, this section was again amended. The words "before or after judgment," was substituted for the words "at any time," and the clause "when the amendment does not substantially change the claim or defence," was inserted. It was inserted after the sentence "or by inserting other allegations material to the case, and the word "or" was omitted or stricken out of the sentence, "or by conforming the pleading or proceeding to the facts proved;" so that the section as it now stands, reads, "The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case, when the amendment does not change, substantially, the claim or defence, by *conforming the pleading or proceeding to the facts proved.*" If this section was enacted for the first time in its present shape, it would be difficult to interpret it otherwise than as limitation of the power of amendment to cases arising upon the trial, in which it might become necessary to conform the pleading or proceeding to the facts proved, and if that construction is now to be given to it, it will greatly abridge that extensive power of amendment which the court possessed before the Code and up to the last revision of it. After the twenty days from the service of an answer or demurrer, within which time a party has the right to amend, of course, and without costs, there would be no power to amend until facts were proved upon the trial, rendering an amendment of the pleading or proceeding necessary, unless the court may be supposed to possess the power of allowing amendments independent of the Code. This, how-



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ever, I am inclined to doubt. The whole subject has now been made a matter of statute regulation, and unless the power can be derived from the Code, I doubt if the court can exercise it. As the 173d section now stands, the court may at any time, before or after judgment, amend a pleading or proceeding, by adding or striking out the name of a party, or a mistake in any other respect. Of the right to allow amendments of this character, I think there can be no doubt. The whole difficulty arises from the change that has been made in the provision that follows: "or by inserting other allegations material to the case, when the amendment does not change substantially the claim or defence, by conforming the pleading or proceeding to the facts proved," and the main cause of the difficulty lies, as before suggested, in the omission of the words "or" in the provision as it now stands. If this omission was intentional, then there is no other construction to be given than the one before stated, and we have no power to grant amendment asked for in this stage of the suit. It is an application to insert "other allegations" than those provided for in the previous part of the section, and comes within the latter provision alone. After a very full examination, I am disposed to hold, though with great doubt, that the omission was unintentional. That the latter part of this provision, instead of qualifying the whole of the preceding part, should read "or by conforming the pleading or proceeding to the facts proved"; thus making it one of the specific cases in which an amendment may be allowed, instead of the only case, in which allegations, other than those previously provided for, can be inserted.

In construing a statute, we may look to all the revisions it has undergone for the determining its real meaning. A mere change in the phraseology of a statute will not alter its effect, unless it is apparent that such was the intention. Taking into view, therefore, the whole course of legislation in respect to this section, I think it may fairly be assumed that the legislature did not intend by the omission of this single word, to restrict the power of amendment in so great a degree. That it was their intention in legislating upon this subject, to afford increased facilities in the way of amendment in furtherance of justice. To enlarge, and not to diminish them. And I think it would defeat the very

purpose they had in view to give to this provision such a narrow and limited construction. The practical effect of it would be to compel parties to go to trial upon defective pleadings, and then apply, after the facts were proved in the course of the trial, or after it, for liberty to amend them. This would lead to infinite embarrassment and difficulty. The amendment of a pleading frequently requires a new answer or reply; the forming of a new and different issue. Postponements and adjournments would necessarily follow to enable parties to put their pleadings in a proper shape; and thus, after the time of the court had been unprofitably spent in receiving evidence; I can not think that the legislature intended any such thing. Instead of furthering the administration of justice, it would seriously obstruct and embarrass it. It would lead to infinite perplexity; to a great waste of the public time and throw our system of pleading into a state of chaos, which I should be unwilling to suppose was the intention of the framers of this amendment. The question however, as a matter of practice, is of great importance, and as it was not raised or discussed upon the argument of the motion, it would perhaps be more satisfactory to the parties to bring it before the general term, that it may have the benefit of a more mature consideration. For the purposes of the present motion, I shall hold we have the power to allow the amendment.

The next question that arises, is, whether the proposed amendment substantially changes the nature of the *claim*? The complaint is for goods sold; the answer, that they were sold upon a credit which has not yet expired. To which the plaintiff replies, fraud in the sale. He now proposes to amend his complaint by averring a sale upon a credit of six months, obtained through fraudulent representations on the part of the defendant, and claims to recover, as his damages, the value of the goods. The effect of this amendment will be to change an action founded upon contract, into an action of tort. In 3 *How. Pr. R.* Judge PARKER held that a change in the form of action did not necessarily change the cause of action, and such was the former practice (2 *Chitty Arch.* 746; *Gra. Pr.* 656).

This decision was made when this section authorized amendments that did not substantially change the "cause of action."

The word "*claim*" is now substituted for cause of action, and it becomes necessary to fix the meaning of that term. The cause of action is the statement in the complaint of the facts upon which the party founds his claim for relief, and the claim is the particular relief sought. The amendment proposed, though it changes the cause of action, does not change the nature of the claim. In the present complaint the plaintiff demands judgment for \$162.87, the contract price for the goods. In the complaint, as proposed to be amended, he demands judgment for the same sum averring that to be the value of the goods.

The remaining question upon this motion is the terms upon which the amendment should be granted. Under the former practice such amendments were allowed upon the payment of the costs of the term and costs of the motion, unless the defendant changes his defence, when he is entitled to the payment of the whole of his costs up to the time of the amendment (4 *Cow.* 503), and such will be the rule in the present case.

NOTE.—The 173d section of the Code, as amended in 1852, reads as follows (*the amendments in italics*): "The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, *process* or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, *or* when the amendment does not change substantially the claim or defence, by conforming the pleading *or* proceeding to the facts proved."

Quere—Whether the last change reaches the difficulty the court had in its construction before?

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## SUPREME COURT.

LANE AND LAING agt. MORSE AND STUDLEY.

An *affidavit*, without a *venue*, verifying a complaint, taken before a commissioner of deeds, whose *residence is not mentioned*, is a *nullity*. No presumption arises that an affidavit has been made at any particular place.

A defendant is not bound to return such a complaint as defective. He may serve his answer without a verification.

*Ontario Circuit and Special Term, February 1852.* The affidavit verifying the plaintiffs' complaint, purported to have

been made before F. L. Durand, commissioner of deeds. There was no venue to the affidavit, and nothing upon its face to show where it was taken, nor of what place or county Durand was a commissioner. The defendants' attorneys served their answer without its being verified which the plaintiffs' attorney refused to receive, and proceeded to enter up judgment as though no answer had been served. The motion was to set aside the judgment for irregularity, upon the ground that the complaint was not verified in such a manner as to entitle the plaintiffs to a verified answer.

T. HASTINGS, *for Defendants.*

O. M. CRANDALL, *for Plaintiffs.*

JOHNSON, Justice.—The venue is an essential part of every affidavit. It is prima facie evidence of the place where it was taken (Belden vs. Devoe, 12 *Wend.* 225, *note*; 3 *Hill*, 461). An affidavit should show upon its face that it was made before some officer competent to take affidavits, and within some place where he was authorized by law to administer an oath. This, at least, would seem to be necessary to show a legal verification.

For aught that appears, this affidavit was made in Canada, or in some other state, where the oath administered was extra judicial and void. No presumption arises that an affidavit has been made at any particular place within the state; nor, indeed, that it was made within the limits of the state, where no place is mentioned. The affidavit did not, therefore, contain enough to show that the plaintiff in verifying his complaint, had been legally sworn, and consequently the defendants were at liberty to put in their answer without a verification. It is not a case where the defendants were bound to return the complaint, if they regarded the verification as defective, as supposed by the plaintiffs' counsel.

The judgment and execution must, therefore be set aside, with costs of the motion.



## SUPREME COURT.

WILLIS agt. UNDERHILL.

*Held*, that a husband is a competent witness to prove a marriage (where the wife sues alone for her separate property).

That a *feme covert* can take a gift or assignment of a debt, as well as of other personal property, and hold the same "to her sole and separate use, &c. in like manner and with the like effect as if she were unmarried."

That in an action concerning her separate property, she is not bound to join her husband but may sue *alone*.

That she must, however, have a *next friend*, although she sues alone.

That the objection may be taken at any stage of the suit, but the court may, in its discretion, allow an appointment of a next friend *nunc pro tunc*.

That an admission of a fact alleged in an answer by failure to reply, authorizes the court to disregard a report of referee or the verdict of a jury found to the contrary of such allegation; but a reply may be allowed *nunc pro tunc*.

Where a demand is transferred merely for the purpose of making the assignor a witness to prove it, the defendant should be allowed to become a witness on the opposite side.

*New York Special Term, January 1851.* Action for balance of account for work and labor alleged to have been done for defendant by one Rummig, and by him assigned to plaintiff. Defence, first, that no debt was ever due; secondly, if due, that it had been paid; and, thirdly, that at all events, it did not belong to the plaintiff. It was alleged, also, that plaintiff was a married woman, suing without her husband, and without a duly appointed next friend to be responsible for costs in the event of failure.

The referee had made a general report in favor of plaintiff, which defendant moved to set aside, and to dismiss the complaint with costs.

D. W. CLARKE, *for Plaintiff*.

J. J. RADCLIFFE, *for Defendant*.

ROOSEVELT, Justice—held that a husband was a competent witness to prove a marriage.

2d. That the marriage in this case was abundantly proved, even without his testimony.

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Willis agt. Underhill.

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3d. That the plaintiff, although married, was competent to take a gift or assignment of a debt, as well as of any other "personal property," and to hold the same "to her sole and separate use, &c., in like manner, and with the like effect as if she were unmarried." This is the express language of the statute of 1849.

4th. That as "the action concerned her separate property," she was not bound to join her husband, but by the express terms of the Code (§ 114), was authorized at her option, to "sue alone."

5th. That (under the late decisions), although she may sue alone, that is, without her husband, she can not sue without a next friend—*dubitatur*.

6th. That the objection may be taken at any stage of the suit; but the court at any stage of the suit may, in its discretion, and upon terms, allow an appointment to be made *nunc pro tunc*.

7th. That the objection arising out of the omission of the plaintiff to reply to the defendant's allegation of payment, made in his answer, is an admission of such allegation also in every stage of the suit, and is sufficient ground for disregarding either the report of a referee or the verdict of a jury to the contrary. But this omission too may in like manner be supplied *nunc pro tunc*.

8th. But as one party has had the benefit of the testimony of the original creditor, who probably, as the evidence very strongly indicates, made the transfer merely for the purpose of becoming a witness, it is just and equitable that the other party, according to the recent amendment of the Code (§ 399), should have the like privilege.

The court, therefore, must give judgment for the defendant, notwithstanding the report of the referee, unless the plaintiff procures the appointment of a next friend, and puts in a reply to the plea of payment, *nunc pro tunc*, and consents that the case be referred back to the referee to take the testimony of the defendant as a witness, and make a further report upon a review of the whole issue.

## SUPERIOR COURT.

GELSTON agt. MARSHALL.

Where a petition by the defendant asks a discovery from the plaintiff of certain deeds and other instruments in writing, to enable the defendant to *answer the complaint*; and no fact is stated showing how the discovery is necessary, except that he expects to be *able to prove* that the note, &c. (sued upon), were paid, *Held*, that such an application does not come within the provisions of § 388 of the Code. It must be governed by the Revised Statutes (2 R. S. 199, § 22), and the former chancery practice, which prescribes the requisites of such a petition.

Also *held*, that the defendant must show *how, or why*, it is necessary to have the discovery in order to prepare his answer. In other words, he must set forth the necessary *facts* in his petition.

This is a petition by the defendant to compel a discovery from the plaintiff of certain deeds and other instruments in writing, to enable the defendant to answer the complaint. The petition states that the suit is brought on certain notes and acceptances given by the defendant for the accommodation of one Wadsworth of Baltimore; and that it is necessary for the petitioner to have a discovery of the deeds and other instruments specified in his petition relating to the dealings and transactions between the plaintiff and said Wadsworth, to enable him to answer. No fact is stated in the petition showing how the discovery is necessary for the answer; and no reason is given in the original petition for the application, except the advice of counsel. By the amendment to the petition, the defendant states that with the aid of the discovery he expects to be *able to prove* that the note and acceptances were paid by the transfer of the property mentioned and described in the papers whereof a discovery is sought.

RALPH LOCKWOOD, *for the Petitioner*

CHARLES A. PEABODY, *Contra.*

MASON, Justice.—The 388th section of the Code, to which the counsel referred on the argument, does not appear to cover this case. That section authorizes an order for an inspection and

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Gelston agt. Marshall.

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copy, or permission to take a copy of books, papers and documents containing *evidence* relating to the merits of the action, or the defence therein. The present application is not for documents to be used as evidence, but to enable the defendant to put in his answer. It comes, therefore, under the provisions of the Revised Statutes, and the rules of the Supreme Court, which are also the rules of this court. The statute declares (2 R. S. 199, § 22), that the court shall be governed in compelling discovery by the principles and practice of the Court of Chancery; and the 9th rule of court, which prescribes the requisites of the petition, provides that it shall state the facts and circumstances on which the discovery is claimed; and the established rule under this provision is, that the party applying for such discovery shall show how, or why it is necessary to have the discovery asked, in order to prepare the answer (Stanton vs. the Delaware Mutual Ins. Co., 2 Sandf. S. C. R. 662). No such necessity is shown.

The defendant does, indeed, state in his amendment to the petition that with the aid of the discovery he will be able to *prove* that the note and acceptances have been paid, but that does not show that the discovery is necessary to enable him to prepare his answer.

He is not required, and it would be improper to set forth the evidence in his answer. The province of the answer is to state facts, and not the evidence of facts; and it appears from the petition itself, that the defendant has sufficient information to enable him to state the facts in his answer with the requisite fullness and particularity to lay a foundation for the introduction of the evidence, which he alleges the papers now sought to be discovered contain.

The motion must be denied with ten dollars costs.



## SUPREME COURT.

HUNT agt. MEACHAM, IMPLEADED, &amp;c.

Where the defence is not founded upon a written instrument for the payment of money only, in the possession of the attorney, he must have personal knowledge of all the material allegations of the answer to enable him to verify.

*Clinton Special Term, February 1852.* This was a motion to set aside or strike out an answer for a defective verification, which was as follows:

“Clinton County, ss: A— B—, attorney for Joel E. Meacham, being duly sworn says, that the said defendants, Joel E. Meacham and Henry F. Royce, are both absent from the state of New York, and this defendant is unable to procure the verification of either of the said defendants to this plea or answer. This deponent further says that the facts set forth in the foregoing answer he believes to be true; that the deponent has no personal knowledge of the same other than that derived from the statements made by the said Joel E. Meacham, part of which was made upon oath in the presence of this deponent, and part in an interview with the said Meacham and while deponent was acting as counsel for said Meacham, and which statement deponent believes to be true. (Signed) A— B—.

Sworn, &c.”

No written instrument was the foundation of the defence.

G. M. BECKWITH, *for the Motion.*

P. G. ELLSWORTH, *Contra.*

HAND, Justice.—If the defence be not founded upon a written instrument for the payment of money only, in the possession of the attorney, he must have personal knowledge of all the material allegations of the answer, to enable him to verify (*Code*, § 157). In this case, no such instrument was the foundation of the defence, nor did the attorney possess the requisite knowledge. It is not necessary now to decide what knowledge the attorney must have when he is possessed of such an instrument.

The motion must be granted, but with leave to amend.

Ordered accordingly.

## SUPREME COURT.

## BUDDINGTON agt. DAVIS AND OTHERS.

The plaintiff charges the defendants with maliciously publishing a *libel*. The defendants 1st, deny the charge. 2d. *If the same was published by them, it was true*. 3d. *If the same was published by them it was privileged*.

To the 2d and 3d grounds of defence, the plaintiff demurs. *Held*, that the 2d defence can not be sustained, because it is not a statement of any new matter constituting a defence, nor does it confess and avoid the charge (*see Code*, § 149, *sub. 2*). It is nothing more nor less than a *conditional* defence.

Also *held*, that the 3d ground of defence is defective, because its allegations are not only *conditional*, but if properly averred would not *per se* constitute a defence. For a *privileged* communication may be libelous as well as any other. It depends upon the proof of malice. Where it is not privileged malice is presumed.

(*This agrees with Graham agt. Stone, ante 15; Lewis agt. Kendall, ante 59; Sayles agt. Wooden, ante 84; Anibal agt. Hunter, ante 255; Purdy agt. Carpenter, ante 361; Brown agt. Orvis, ante 376.*)

*Ulster Special Term, May 1851. Demurrer to defendants' answer.* The action was brought for a libel. The publication containing the alleged libel, consisted of a communication signed by the defendants, and addressed to the Postmaster General, asking for the removal of William Grant from the office of postmaster at Rosendale, and alleging, as the ground of such application, that the business of the office had been entrusted to the plaintiff, as deputy and that he was a man of intemperate habits, &c The defendants, in their answer, first deny all the material allegations in the complaint. They then say that *if they ever signed or published* the alleged libel, "*the same was in each and every allegation, and in each and every part thereof correct and true*. They then say, as a third ground of defence, that *if the same was ever subscribed and published by them*, it was a petition addressed to the Postmaster General for the removal of Grant on account of the acts, conduct and character of the plaintiff, and it was therefore a privileged communication. To the second and third defences the plaintiff demurred, stating grounds of demurrer, which are sufficiently noticed in the opinion below.

E. COOKE, *for Plaintiff*.

T. R. WESTBROOK, *for Defendants*.

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Buddington agt. Davis and others.

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HARRIS, Justice.—The *principles* of pleading, whatever the system, are always the same. Its office is, to present the cause of action on one side, and a defence on the other. This is not less true under our present system, than it was under the former. Names are changed—useless forms and technical rules are abolished, but the principles remain unchanged. What now is a good answer, would before have constituted a good plea in bar. Each, the answer as well as the plea in bar, must present matter which furnishes a conclusive answer to the cause of action alleged in the complaint or declaration. A plea in bar must either *deny* the facts stated in the declaration, or it must *confess and avoid them*. So, under the present practice, the answer must either *controvert* some allegation material to the cause of action, or state some new matter, which, admitting the allegations of the complaint to be true, will *constitute a defence*. In other words, it must *traverse or deny* the matter of the complaint, or it must *confess and avoid it*. In the latter class of pleadings, whether under the Code, or at common law, *confession* is an element as essential as *avoidance*. There must be an *express* or *implied* admission that the allegations constituting the cause of action are true, with a statement of matter which destroys their effect. “The plea,” says Chitty (1 *Chitty’s Pl.* 527), “must give *color* to the plaintiff, that is, it must give him credit for having an apparent or *prima facie* right of action, independently of the matter disclosed in the plea to destroy it. So must the answer. The defendant may now, as before, set forth as many defences as he may have. But each defence must be separately stated. He may, in a case like this, deny any or all the allegations of the complaint. He may then by a separate statement in the same answer, allege the truth of the statements contained in the libellous publication. And then again, if such an allegation will constitute a defence, he may state as a third defence, that the publication was privileged; but he can not in the *same defence* deny the allegations of the complaint, and set up new matter to avoid their effect. When the defence consists in the statement of new matter it must, at least, admit the apparent truth of the allegations it would answer.

Let us apply these principles to the case in hand. The de-

defendants say, in the first place, that they are not guilty as is charged in the complaint. This, of course, is a good defence; it puts the plaintiff upon the proof of his cause of action. Then they say, as a second defence, "if we have made the alleged publication, we have published no more than the truth." This is not a defence; it is not "a statement of any new matter constituting a defence." The defendants merely say, "if it shall be proved that we have published the alleged libel, then we say that we have published nothing more than the truth, but if that shall not be proved, then we say no such thing." Such a *de bene esse* defence can not be sustained. The defendants must in this branch of their defence admit, at least impliedly, "the apparent truth" of the complaint, and then state, in the manner prescribed in the *second* subdivision of the 149th section of the Code, such facts as, if true, will constitute a defence. This they have not done, and this part of the answer must, therefore, be held to be insufficient.

The third defence is still more defective. Its allegations are not only made *conditionally*, but the facts thus alleged, if they had been properly averred would not *per se* have constituted a defence. These facts show, perhaps, that the communication was privileged. But a privileged communication may be libelous as well as any other. The only difference between a privileged communication containing libelous matter, and one not privileged, consists in the proof necessary to sustain the action. When the communication is not privileged, malice need not be proved. It will be inferred from the slanderous character of the imputations. But when the communication is privileged, good faith will be presumed, and the plaintiff, before he can recover, must show not only the publication, but that the defendant in making it was governed by bad motives; that he embraced the occasion when he might make a privileged communication, to injure the plaintiff. In this case, the plaintiff charges the defendants with having made the publication "maliciously, and with intent to injure and defame the plaintiff." If this allegation should be established, then it is no defence to show that the communication was privileged. All that the defendants could do to avail themselves of this ground of defence was to put in issue the



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Perry agt. Livingston and others.

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allegation of malice in the complaint, and then, if upon the trial it should appear that the communication was privileged, the plaintiff before he would be entitled to a verdict, would be obliged to satisfy the jury that the defendants in making the communication, acted in bad faith and with malicious motives. The plaintiff is entitled to judgment upon the demurrer, but the defendants are to be at liberty to amend in twenty days upon payment of costs.

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## SUPREME COURT.

PERRY agt. LIVINGSTON AND OTHERS.

## COSTS.

In an action brought upon an alleged partnership contract to recover against three defendants, where the referee found that there was no partnership between the defendants, the following questions of cost were decided:

1. Where two of the defendants appeared by an attorney, and the other defendant by a separate attorney who was a clerk in the office of the first attorney, but one bill of costs is taxable;
2. Where a cause is referred at the circuit on the ground of its being a referable cause, and before it is reached in its order, the charge of ten dollars as a circuit fee is not allowable;
3. The charge "after notice of trial," \$7, is taxable but once, although the cause is more than once noticed at the circuit or upon a reference. It is a charge for all proceedings before actual trial;
4. Where the plaintiff is an assignee of the demand sued upon, and gives notice that he will examine the assignor as a witness under § 399 of the Code, and where the demand sued upon is a joint one against the defendants, *held*, that the defendant could not charge for the travel and attendance of his co-defendants as witnesses, although they were subpœnaed to attend as witnesses did attend, and were sworn and testified, under the authority of § 399.

*At Chambers, January 1852.* This was an action upon contract, alleged to have been made jointly by the defendants as partners. The partnership was denied, and the referee to whom the action was referred, found that there was no partnership and made a general report for the defendants. Upon the adjustment of the costs, several questions arose which were decided by the clerk adversely to the plaintiff, who moves for a readjustment.

WARD HUNT, *for Plaintiff.*

F. KERNAN, *for Defendants.*

W. F. ALLEN, Justice.—1. The clerk erred in allowing to the defendants separate bills of costs. To defendants who succeed and who have severed on the defence and appeared by separate attorneys, separate bills of costs are allowed (*Tenbroeck vs. Page*, 6 *Hill*, 267). Where they appear by the same attorney, although they answer separately, but one bill of costs can be taxed (*Albany and W. S. R. R. Company vs. Cady*, 6 *Hill*, 265; *Tracy vs. Stone*, 5 *How. Pr. R.* 404). The rule is the same where they appear by different attorneys who are partners (*Crofts agt. Rockefeller*, 6 *How. Pr. R.* 9).

In this action the defendants appeared nominally by different attorneys, but the attorney upon record of one of the defendants was and is the clerk of the attorneys of the other two defendants, and it is not claimed that he acted in the defence other than as the clerk and for the benefit of his principals. It was in effect an appearance by the same attorney. There was no necessity for a separate defence. The fact that the defendants were not partners, and as such joint contractors, furnished an available defence to all the defendants, and it was not a case in which a judgment could have been given for or against one or more of several defendants; a several judgment would not have been proper (*Code*, § 274). But one bill of costs should have been allowed.

2. The action was noticed for trial at the circuit, and before it was reached upon the calendar was referred upon motion of the defendants. The clerk has allowed "after notice of trial for circuit, \$7," and "after notice of trial for reference, \$7." But one of these items should have been allowed. The provision under which the item is allowed is as follows: "To the defendant, for all the proceedings before notice of trial, five dollars; for all subsequent proceedings before trial, seven dollars" (*Code*, § 307, *sub.* 2). The five dollars is allowed for putting the cause at issue and noticing it for trial, and the seven dollars for all subsequent services before *actual trial*. If the cause is necessarily noticed for trial more than once, the only compensation to

which the party is entitled, is given by subdivision 8 of the same section.

It would have been strange had the legislature allowed but five dollars for *all* the proceedings, before notice of trial, including an answer, and allowed seven dollars for every notice of trial; but the language employed and the whole tenor of the provisions of the Code in relation to costs, are entirely inconsistent with such a construction.

3. The cause was referred before it was reached upon the calendar at the circuit, upon the instance of the defendants, and the clerk allowed to the defendants, under the objection of the plaintiff, ten dollars for that circuit. I think in this the clerk erred. 1st. If the cause was a referable cause, as it doubtless was, in as much as it was referred upon motion and under the objection of the plaintiff, it was not necessarily upon the calendar." The defendants might and should have moved the reference before the circuit and without putting the cause on the calendar. 2d. The item can not be allowed for the reason that the cause was not reached upon the calendar. It was not for that cause that the action was not tried at the circuit at which it was noticed. The cause would have been tried had it been properly triable at the circuit. 3d. The cause was not postponed within the meaning of the statute. That clause of the statute is designed to embrace those causes, the trial of which is deferred from circuit to circuit for cause—not to actions which are placed upon the calendar and referred before they are reached (*Code*, 307, *sub.* 8).

4. A more serious question arises upon the allowance of witness's fees to the defendants for their attendance upon the trial. The action was brought by the plaintiff as assignee of the demand and the assignor was examined as a witness on his behalf (the plaintiff having given previous notice that he would be so examined). The defendants offered themselves as witnesses to the same matter, and were sworn on their own behalf (*Code*. § 399). The clerk allowing separate bills of costs to the defendants' appearing separately, allowed to the defendants, Henry W. and Horace C. Livingston, for the attendance of Van Vechten Livingston as a witness in their behalf, and to Van Vechten Livingston for the attendance of his codefendants as witnesses in his behalf.

There is nothing in the case to show that there was any matter in issue in which all the defendants were not jointly interested, and as to which a separate verdict or judgment could have been rendered, and to which any one of the defendants could have called his codefendants as witnesses within § 397 of the Code. The examination of the defendants was under the section before cited (§ 399), and in answer to the testimony of the assignor of the demand. It was not, therefore, a calling of one defendant as a witness for his codefendant, but it was an offer by each defendant of himself as a witness in his own behalf as well as in behalf of his codefendants. The examination was for the benefit of all and was not restricted to be used only in behalf of the codefendants under § 397. Can then a party be allowed for travel and attendance to give evidence in his own behalf as a witness? By the Code the prevailing party upon a judgment is allowed certain sums by way of indemnity for his expenses in the action, which allowances are termed costs (*Code*, § 303). By section 311, the clerk is authorized to insert in the entry of judgment, on the application of the prevailing party, the sum of the charges for costs as prescribed by the act, "and the necessary disbursements and fees of officers allowed by law." Witnesses are by law entitled to a certain compensation for their attendance, without the payment of which their attendance can not be compelled (*Laws of 1840, ch. 386, § 8; 2 R. S. 400, § 42*). It is as a necessary disbursement that the party is allowed to recover the amount paid for witnesses fees. If not actually paid, the party in whose behalf they attend is liable to pay them. But there is no such necessary disbursement incident to the attendance of the party; he attends voluntarily. It is true he necessarily incurs an expense in attending the trial of a cause, but it is not a fixed amount of fifty cents a day and four cents for each mile travelled, which is the amount he necessarily disburses to his witnesses. His expenses, if to be allowed at all, can not be regulated by the amount to which witnesses are entitled, but must be governed by the amount actually and necessarily disbursed by him in his attendance at the trial, to be shown by affidavit. But if the expenses of a party attending the trial of a cause to give evidence in his own behalf can be allowed him



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Jackson agt. McBurney.

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as a necessary disbursement, then he should be allowed his necessary expenses while attending to aid and advise with his counsel upon the trial, which is ordinarily necessary. The principle is the same whether his attendance at the trial is for one cause or another, if it is necessary to the proper defence or prosecution of the action; and if the expense of attendance should be allowed in one case it should in all. There may be cases under § 397 in which a party may recover witnesses fees for the attendance of a codefendant; but this case is not within the provision of that section.

In *Christy vs. Christy* (6 *Paige*, 170), the chancellor held that when a complainant was examined as a witness in his own favor, in a case in which such examination was allowed, he was not entitled to charge for his fees as a witness. The cases are analagous, and if there were any doubt upon principle, this authority would be conclusive upon me.

Certain technical objections were taken upon the hearing which were finally waived and are therefore not considered. The conclusions to which I have come affect very seriously the amount of the compensation and the extent of the indemnity given to the defendants, and leaves them, probably, an inadequate compensation for the expenses incurred in the litigation. But the remedy is, I think, with the legislature. There must be a reference to the clerk of Oneida county to readjust the costs upon the principles indicated, without costs to either party.

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## SUPREME COURT.

JACKSON agt. MCBURNEY:

A charge of \$7, for all subsequent proceedings before trial (§ 307) can be allowed only once, though the cause may have been several times noticed for trial. (*This agrees with Perry agt. Livingston, ante page 404.*)

*Tompkins Special Term, March 1852. Motion to strike out certain items of costs.* The plaintiff commenced his bill of costs by charging for "proceedings before notice of trial, \$12; subsequent \$7," and repeated the charge of the item of \$7 four

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Jackson agt. McBurney.

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times once for each circuit, the cause was noticed for trial. On the adjustment of costs before the clerk the several repetitions of this charge were objected to, but allowed by the clerk, and now the defendant moves to strike out from the plaintiff's bill of costs \$28, being the aggregate amount of the several repetitions of this charge, and to have the same deducted from the judgment entered in the cause.

GEO. T. SPENCER, *for the Motion.*

J. McGUIRE, *Contra.*

H. GRAY, Justice.—The only authority relied upon to justify the repeated charge of this item of \$7, is the case of *Mitchell agt. Westervelt* (6 *How. Pr. R.* 265). The question here presented does not appear to have arisen in that case; the report of it does not show that the \$7 was charged a second time, and hence the case furnishes no authority upon the point in controversy. The reason assigned by the court in that case for the legality of the charge was, that it “was intended as a compensation for a notice of trial, issuing subpœnas, &c., preparatory to trial, and was a part of the costs of the circuit.” The plaintiff assumes that the grounds upon which the charge in that case was upheld, justifies the repetition of the charge whenever the services which it was intended to compensate are necessarily repeated. The services performed in making a brief and copy pleadings are a part of the costs of the circuit; the reward for them is included in this item of \$7; if the cause is not tried, those services are not necessarily repeated and were not, under the old system, allowed to be more than once taxed during the progress of the cause. This \$7 was in the case referred to, properly denominated a part of the circuit costs, and is so when the cause is tried at the first circuit for which it is noticed; but if the trial is postponed it can not be included in the costs of circuit any more than the brief and copy pleadings could have been under the old practice. The circuit costs now imposed as a condition upon which a cause may be postponed is limited to \$10, besides the fees of witnesses (*Code*, § 314). Part of this sum of ten dollars was doubtless intended to cover the slight and easily performed services necessary to be repeated; such as noticing the cause and issuing sub-

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Dowling agt. Bush.

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pœnas, leaving the item of \$7 to cover those that are past, including brief and copy pleadings; but we are not left to infer the intention of the framers of the law regulating costs; their meaning is too clearly expressed to admit of a doubt. This item of \$7 is given in but a single instance, and that is after the cause is noticed for trial, and is then in terms made a compensation "*for all subsequent proceedings before trial* (§ 307, *sub. 1*), unless the cause is not reached or is postponed, and then ten dollars is given (*id. sub. 8*).

The repetition of the charge of \$7 was erroneously allowed by the clerk. The motion to strike it out, and for an order that \$28 (the aggregate amount of the several repetitions of the charge) be deducted from the judgment, must be granted with \$10 costs.

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## SUPREME COURT.

DOWLING agt. BUSH.

### COSTS.

Where an affidavit on information and belief, in answer to the ordinary affidavit of the travel and attendance of witnesses, shows that some of the witnesses were not in attendance, but had left the court for their residences before the trial of the cause came on, it is sufficient to call upon the party claiming the fees for further explanation. The taxing officer is not at liberty, longer, to follow the ordinary affidavit.

A party who subpœnas a witness to attend the trial of a cause, and permits him to depart before the trial is brought on, so that he can not avail himself of his testimony, is no more entitled to the fees of travel and attendance for such witness, than he would, had the witness come after the trial was over. (*In the latter case the fees can not be taxed, 5 Wend. 107.*)

If the witness departs court without leave, his fees may be recovered back.

A foreign witness subpœnaed at the place of trial is not entitled to travel fees.

*Ontario Circuit and Special Term, February 1852. Motion for retaxation of costs.* The plaintiff was nonsuited on the trial at the Ontario circuit. The clerk on the taxation of the costs allowed the defendant attendance and travel fees for nine witnesses. The affidavit of the defendant, presented to the clerk,

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Dowling agt. Bush.

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stated that each of said witnesses "attended as a witness on the trial of this cause the number of days and traveled the number of miles in going to and returning from said trial hereinafter stated," stating the same. It also stated that each was subpoenaed in good faith under advice of counsel and that each and every of them was a material and necessary witness for the defendant on the trial of the cause.

Two of the witnesses resided in the state of Michigan and fees for two hundred miles travel from the line of the state were allowed for each, and ten days attendance for one, and five days for the other

The plaintiff appeared and objected to the allowance of any fees for the attendance and travel of witnesses. He presented his affidavit to the clerk which stated one of the foreign witnesses, William Bush, attended the circuit where the cause was tried as a party in a suit of his own, which was tried several days before the trial of the cause in question. And that soon thereafter, and several days before the trial in question, he said Bush left the place of trial for his residence in Michigan, and was not in attendance at the time of the trial. This was stated upon information and belief. It also stated upon information and belief that the other foreign witness, Henry C. Bush was not in attendance at the trial, but that before, or during the day of trial, left for his residence in Michigan. It further denied, generally upon information and belief, that any of the other witnesses attended in pursuance of a subpoena and that they were material in the cause.

J. CALLISTER, *for Plaintiff.*

E. G. LAPHAM, *for Defendant.*

JOHNSON, Justice.—The defendant's affidavit was abundantly sufficient, uncontradicted, to authorize the allowance of all the fees for travel and attendance. But when the plaintiff showed that the foreign witnesses were not in attendance, but had left for their residences in a foreign state before the trial was brought on, the clerk should have called for explanation and further proof before allowing their fees. The ordinary affidavit should have been no longer followed as sufficient (*Dean vs. Williams*, 6 *Hill*,



376). Where the departure of the witnesses before the trial was shown, or enough shown to call for an explanation from the defendant, he should have been required to show where they were subpoenaed and why they were permitted to depart.

It is difficult to see how a party can swear that a witness was material and necessary on the trial of a cause, whom he has permitted to depart before the trial is moved. The fact of the departure ought to be taken as conclusive that the witness was not regarded as material, notwithstanding the common affidavit, unless the party claiming his fees can show in explanation that it was in consequence of some admission or concession on the other side, which rendered his evidence unnecessary, or some other fact to prove the necessity or supposed necessity of his attendance at all.

I apprehend that a party who subpoenas a witness to attend the trial of a cause, and permits him to depart before the trial is brought on, so that he can not avail himself of his evidence upon the trial in case it becomes necessary, is no more entitled to have the fees for his attendance and travel taxed, than he would be had the witness come to the court after the trial was over. In the latter case it has been expressly held that the party is not entitled to the fees (*Booth vs. Smith*, 5 *Wend.* 107). If the witness departs without leave, his fees may be recovered back; the witness is not entitled to retain them, and consequently the party subpoenaing him can not recover them of his adversary (*Ehle vs. Bingham*, 4 *Hill*, 595; *Anon.*, 3 *Hill*, 457).

So where it was shown that one of the witnesses was attending court as a party in a suit of his own, the plaintiff should have been required to show affirmatively where he was subpoenaed. A foreign witness, subpoenaed at the place of trial, is not entitled to travel fees, and the party can not have them taxed (*Bank of Niagara vs. Austin*, 6 *Wend.* 548).

It is no answer to say that these facts were sworn to on information and belief merely. Had they been unfounded they might have been readily controverted by the plaintiff. They were affirmative matters and should have been enquired into by the taxing officer.

Aside from the charges for the two foreign witnesses, the

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Nellis agt. De Forrest.

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allowance was proper upon the papers before the clerk. A general negative of the facts stated in the ordinary affidavit, upon information and belief merely, is not, in my opinion sufficient to put the moving party to further proof. And the more especially in this case, where the plaintiff was non suited.

Retaxation ordered.

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## SUPREME COURT.

NELLIS agt. DE FORREST.

### COSTS.

A clerk of the Supreme Court (now county clerk) has no power to adjust costs only on *final judgment*. And that authority is given by § 311 of the Code. (*This agrees with Eckerson agt. Spoor*, 4 *How. Pr. R.* 361; *Morrison agt. Ide*, *id.* 304; *Mitchell agt. Westervelt*, *ante p.* 268.)

On appeals from the special to the general term, the 2d subdivision of § 349 of the Code (1851) reads as follows: "When it (the order) grants or refuses a new trial, or when it sustains or overrules a demurrer." The question that arises now is this; Is the decision at special term, overruling a demurrer, an order, and appealable as such, or a judgment, requiring final judgment to be entered before the appeal can be brought. *Held*, that under this section an appeal may be brought upon the order, without entering final judgment. (*It was otherwise before the amendment. See Bentley agt. Jones*, 4 *How. Pr. R.* 335; *King agt. Stafford*, 5 *id.* 30.)

Therefore, how much costs is a party entitled to on such an appeal? Not exceeding *ten dollars*, as fixed by § 315. And this amount must be inserted in the order, otherwise he can't get it.

*Otsego Special Term, March 1852.* This was a motion on the part of the defendant for an order fixing the amount of costs to be paid by defendant to the plaintiff upon a judgment or order of a single judge, overruling the demurrer of the defendant to two counts of the complaint, and allowing the defendant to answer upon payment of costs, or for an order readjusting the costs as adjusted by the clerk of Oneida county, and for leave to serve said answer.

MR. NEWTON, *for Defendant.*

T. R. FLANDRAU, *for Plaintiff.*

CRIPPEN, Justice.—The papers on which this motion was made, show that the defendant demurred to the complaint; that the court overruled the demurrer to the two last counts of said complaint, with leave to answer on payment of costs. The defendant appealed from the order or judgment against him on the demurrer, to the general term, and judgment of affirmance was rendered on the appeal.

The plaintiff's attorney thereupon noticed the adjustment of his costs on the demurrer and on the appeal before the clerk of Oneida county. The defendant's attorney appeared and opposed such adjustment, and objected to the authority of the clerk to adjust the costs. The clerk overruled the objection, and proceeded to adjust the costs, both on the trial of the issue of law and on the appeal, and allowed the same at \$75.62.

The following items were allowed on the appeal to wit:

|                                           |         |
|-------------------------------------------|---------|
| Printer's fees for printing points, ..... | 4.00    |
| Respondent's costs before argument, ..... | 15.00   |
| For argument, .....                       | 30.00   |
| Clerk's trial fee at general term, .....  | 1.00    |
| Postages, 12½, affidavit, 12½, .....      | 0.25    |
|                                           | <hr/>   |
|                                           | \$50.25 |

The defendant also objected before the clerk, to each of the foregoing items, on the ground that by the judgment of the general term, pronounced upon the appeal, no costs were given thereon to either party; and also that no more than ten dollars costs could have been given by the court.

Section 311 of the Code, authorizes the clerk to adjust costs and insert the same in the entry of judgment, on the application of the prevailing party, &c. No other authority is given to the clerk to tax or adjust costs in any case, and it seems very clear that section 311 only confers this power on the clerk on the entry of final judgment in the action.

In Eckerson agt. Spoor (4 *How. Pr. R.* 361), Justice PARKER decides that no authority is conferred upon the clerk by the Code to tax costs except in cases of final judgment. The same justice decides in the case of Morrison agt. Ide and others (4 *How. Pr. R.* 304), that the clerk has no power to tax costs; his only authority

by § 311 of the Code, is to insert in the entry of judgment the sum of charges for costs and disbursements. No adjustment or taxation of costs is provided for, except what is contained in section 311, and that applies to final judgments.

In the case of Mitchell agt. Westervelt (6 *How. Pr. R.* 268), Justice HAND, expresses a doubt as to the authority of the clerk to adjust costs in any case except on final judgment. He thinks the better way is to fix the amount of costs in the order, and where that can not be done, a reference to the clerk may be had to ascertain and adjust the amount. The court has an undoubted right to fix the amount of costs, or to refer the adjustment to the clerk, in any case where it does not come within the provision of section 311 of the Code.

It does not appear that any objection was raised to the clerk's authority to adjust the costs in the case of Collomb agt. Caldwell (5 *How. Pr. R.* 336). The court in that case decided that the amount of the costs, as well as all the items allowed by the clerk, were legal and proper to be allowed in that case; no objection having been made to the authority of the clerk to adjust the same, the court did not advert to or decide that question. The costs in that case were adjusted on notice, and the amount as fixed by the clerk, paid without objection. The court, therefore, very properly denied a motion afterwards made, for a readjustment of said costs. This case is no authority under the circumstances, upon the questions now raised in the case under consideration.

The court in the 6th district at the January term, 1852, in the case of Burnside agt. Brown and Carpenter, decided that the clerk had no authority to adjust costs in a case where the special term had set aside a report of a referee and granted a new trial on the payment of costs. The order granting a new trial did not fix the amount of costs. The clerk of Otsego county was applied to, and taxed or adjusted the costs. An appeal or a motion was made at a special term for a readjustment, on the ground of an allowance of improper items of costs by the clerk. The court at special term readjusted the costs reducing the clerk's adjustment a few dollars. A motion was then made at the general term in the nature of an appeal from the order made at the special term; and the court decided that the clerk had no authority



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 Nellis agt. De Forrest.
 

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to tax or adjust the costs. That the court at special term had the power to fix the amount by an order made for that purpose, and that the general term had power to review the order of the special term on an appeal brought therefrom.

It appears from authority to be settled law, that the county clerk of Oneida county had no authority to adjust the costs to be paid by the defendant as a condition of his right to answer the complaint. The costs not having been legally adjusted, this court directs and orders that the plaintiff is entitled to the following costs, to be paid by the defendant on the trial of the issue of law, to wit:

|                                                  |         |
|--------------------------------------------------|---------|
| Proceedings after notice and before trial, ..... | \$7·00  |
| Trial of issue of law, ....                      | 15·00   |
| Clerk's trial fee, .....                         | 1·00    |
| Affidavits, .....                                | 0·62    |
| Postages, .....                                  | 1·50    |
| Clerk's fee for certifying copy order, .....     | 0·25    |
|                                                  | <hr/>   |
|                                                  | \$25·37 |

The charges for affidavits and postages were supported by proof. The charge of 25 cents for copy order by the clerk may not and probably is not a legal charge, but I will not now stop to inquire into its legality.

In addition to the above bill of \$25·37, the plaintiff claims to recover costs on the appeal to the general term from the judgment upon the demurrer rendered at a special term.

The court at the general term rendered the following judgment upon said appeal: "Ordered and adjudged that the aforesaid judgment in this action be and the same is hereby in all things affirmed." It will be observed that in giving judgment upon the appeal the court have wholly omitted to award costs to either party.

The appeal in this case is given by section 349 of the Code, and it was brought under that section. This section authorizes an appeal from an order made at a special term by a single judge, to the general term, in certain specified cases. The 2d subdivision of the section reads as follows: "When it grants or refuses a new trial, or when it sustains or overrules a demurrer."

This provision of the Code is new and is found in the Code of 1851, and not in the previous Codes.

Prior to the Code of 1851, a judgment upon demurrer was not appealable until a final judgment was rendered in the action (Bentley agt. Jones, 4 *How. Pr. R.* 335; 5 *id.* 30). In the amendment of the Code in 1851, provision is made in section 349, to obviate this difficulty by giving a right to a party to appeal from an order or judgment upon demurrer before final judgment in the action. The legislature intended to give the party a right to appeal from the judgment of a special term upon a demurrer, without waiting until final judgment. With this view of the case, the next question is how much costs are the parties entitled to recover upon an appeal under section 349 of the Code.

I deem this question to have been settled by a decision of the court prior to the amendment of the Code in 1851, when section 349 was amended as above stated. As early as August 1849, in the case of Savage agt. Darrow (4 *How. Pr. R.* 74), it was held by Justice HARRIS, that the only allowance for costs provided by the Code upon an appeal under section 349 is in section 315, which allows not exceeding ten dollars, in the discretion of the court. This decision of Justice HARRIS has never been doubted or overruled; on the contrary, it has been regarded by the courts and the bar a sound construction and application of the provisions of the Code.

The amendment of section 349 of the Code, made by the legislature after repeated decisions of the court, that a decision upon a demurrer was not an order but a judgment, and that no appeal would lie in such case until final judgment in the action was entered, is strong evidence, to my mind, that the legislature intended to class such decisions under the head of orders of the court, and that an appeal therefrom should be governed by the same rules of law in all respects, as an appeal from any other appealable order made at special term, or by a single judge. If this was not so intended, the provision in relation to appeals from decisions made in overruling or sustaining a demurrer, should not have found a place in section 349.

If my views of this case are correct, it follows that the plaintiff is not entitled to any costs on the appeal. No costs are given

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Noxon agt. Bentley.

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in the decision made by the general term upon the appeal. That court had the power to give not exceeding ten dollars costs; but having omitted to do so no costs are to be recovered by either party.

My opinion, therefore is, that the defendant be allowed to answer the complaint on the payment of the plaintiff's costs upon the trial of the issue of law, which I fix at \$25.37. No costs given upon this motion to either party.

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### SUPREME COURT.

NOXON agt. BENTLEY.

#### COSTS.

On putting off a cause at the circuit only ten dollars, besides witnesses' fees can be imposed.

*Saratoga Special Term, June 1852.* This cause was put over the term on payment of costs, and the plaintiff's counsel insisted that the plaintiff was entitled to \$17, besides the fees of witnesses, within the rule laid down in Mitchell agt. Westervelt (6 *How. Pr. R.* 265).

W. GLEASON, *for Plaintiff.*

J. O. MOTT, *for Defendant.*

HAND, Justice.—The costs on postponing a cause at the circuit, can not exceed \$10, besides the fees of witnesses (*Code*, § 314).

Mitchell agt. Westervelt, does not apply. In that case, the verdict rendered upon the trial, and the judgment, were set aside upon payment of the costs of the circuit, &c.

But in the case now before us, the costs are limited by statute to ten dollars.

## SUPREME COURT.

FELLOWS AND OTHERS agt. SHERIDAN AND OTHERS.

## COSTS.

Where the case is directed to be first heard at a general term, the successful party can not have costs as on an appeal.

*It seems*, that on a motion for new trial in such cases, the court may grant the costs of a motion, not exceeding ten dollars.

*Saratoga Special Term, June 1852.* This was a motion to correct the adjustment of costs by the clerk.

The cause was tried at the Saratoga circuit without a jury; and the justice holding the circuit, decided in favor of the defendant, but stayed the entry of judgment; and the plaintiff made a case, which was settled; whereupon the judge directed the cause to be heard, in the first instance, at a general term. On that hearing the plaintiff also moved for a new trial, on the ground of newly discovered evidence; but the court denied that motion, and also the motion for a new trial on the case. The entry by the clerk at general term was, inadvertently, that a new trial be denied and the judgment of the special term be affirmed. Nothing was said about costs. On the adjustment of costs, the clerk refused to allow costs as in cases of appeal, but allowed ten dollars costs of opposing the motion. The object of this motion is to have costs allowed, as on an appeal, and in addition to the costs of trial.

J. LAWRENCE, *for the Motion.*

E. F. BULLARD, *Contra.*

HAND, Justice.—This was not an appeal, and the costs of an appeal can not be allowed. The cause was sent to the general term, and no judgment given by a single judge. The Code has made no provision for costs to either side, in these cases, whether the proceedings be before one judge or at a general term. It is not an appeal nor a separate or distinct trial of an issue of law or fact; but rather a continuation of, or an incident to the trial (*Code*, §§ 252, 264, 265). And the fee given for a trial is, or-



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Ranney agt. Smith.

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dinarily, the compensation as against the other party, for the services of the attorney and counsel from the commencement of the trial to judgment (*id.* § 307), except that where a motion for a new trial is made upon a case, &c. I do not see why the court may not allow, not exceeding ten dollars as costs on a motion. That point, however, does not properly arise here; for in this case, there was a motion for a new trial on the ground of newly discovered evidence. The necessary disbursements incident to this proceeding, I think, should also be allowed (*id.* § 311). Motion denied.

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## SUPREME COURT.

RANNEY agt. SMITH.

A statement of *set off* in the answer, § 149, is a *defence* under § 150.

In stating a set off comprising promissory notes, judgment, chattel mortgage, &c., is it necessary that each note, &c., should be stated in a *separate statement of new matter*? Held, that it is not objectionable to include *all* the set off in the *same statement of new matter*; each note, &c. being *separately* described, with the necessary averments.

*Erie Special Term, August 1851.* The action is upon a note. The answer puts in issue the material allegations of the complaint; and by way of *new matter* states a set off, composed of sundry items, among which are four notes. The defendant in that part of the answer relating to the notes, alleges the plaintiff's indebtedness to the defendant of the further sum of five hundred dollars on four several notes, executed and delivered by the plaintiff, &c.; and the copies of the notes are then given in the answer. The defendant then states a judgment against the plaintiff as a set off, and a chattel mortgage; avers a promise to pay, and that he will set off the moneys due and owing from the plaintiff against any demand of the plaintiff, to be proved on the trial, and claims a judgment for any balance.

The plaintiff moved to strike out or set aside that part of the answer *relating to the notes*, upon the ground that the notes, set forth in that part of the answer, are not *separately stated*.

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Ranney agt. Smith.

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J. L. TORRANCE, *for Plaintiff.*D. BOWEN, *for Defendant.*

MARVIN, Justice.—The answer of the defendant may contain a plain and concise statement of any new matter constituting a defence or set off, without unnecessary repetition. The words "set off," first occur in this part of the Code in the revision of 1851. It is argued by the plaintiff's counsel that each note constitutes a *defence* and that each note should be *separately stated* in the answer. It is not necessary now to consider the question whether under the Code, previous to the late amendment, a defendant could state a set off in his answer as a *defence*. I do not wish to be understood as intimating a doubt upon this question. Set offs have been constantly pleaded under the new system.

The Code now expressly authorizes a statement of *set off* in the answer, § 149, and I shall recognize it as a *defence* under § 150, though it is not there repeated. This latter section requires that each defence shall be *separately stated*. What constitutes a defence here? *Set off*. And of what is the set off composed? The notes, judgment and chattel mortgage stated in the answer. It is argued that each note constitutes a defence to the extent it may reduce the plaintiff's demand, and that therefore each note should be stated in a *separate statement of new matter*, in the answer. This does not follow. We are to have regard to the nature of the defence, and here all the notes constitute a set off. I am not now considering how these notes should be described or set out in the answer; but it is not objectionable to include all the set off in the *same statement of new matter*. This was admissible in a plea under the system superseded, although a declaration formed in the same way would have been bad for duplicity. The general rule was that in point of form, the plea of set off should contain all the requisites essential to the validity of other pleas in bar (1 *Chit. Pl.* 495; *Barb. on Set Off*, 79). Duplicity, however, in a plea of set off was not a cause of demurrer; in other words a defendant was permitted to include in the plea any and all debts or demands which by law he was allowed to set off. This plea so much re-

sembled a declaration, that two parts of it were considered as two counts in a declaration, and if one part of it was good, a general demurrer to the whole was bad; and in this respect a plea of set off differed from other pleas in bar; for, generally, if one part of a plea in bar was bad, the whole was bad (*Barb. on Set Off*, 83, and cases cited; 1 *Chit. Pl.* 457; 1 *East R.* 369). See form of a plea setting off a debt on recognizance; and also debts or demands on simple contract (*App. to Barb. on Set Off*, 178), and replication to the plea (*p.* 192), *nul tiel* record to the plea stating the recognizance and *nil debet* to the remainder. Also at *page* 187, a plea of set off of two bonds; at *page* 174, a plea of set off of bill of exchange and promissory notes; also *Chit. Pl.* 969.

It was not objectionable to state in the same plea of set off any number of debts or demands which the law allowed to be set off. Nor is there now any objection under the Code. The right of set off in actions at law, is derived from the statute. "A defendant may set off demands which he has against the plaintiff." "To entitle a defendant to a set off he must plead or give notice of the same" (2 *R. S.* 354, § 18 and 19). Notice of set off is no longer admissible.

I have referred to forms to show the manner of stating the various demands in the plea. In stating the *particular* demand nearly, the same strictness was required as in counting in a declaration upon the same debt or demand. Thus a judgment was described in the same manner as in a declaration upon the judgment, and if the same plea contained a note or bill of exchange, the note or bill was separately described as it would have been in a declaration, with all the averments necessary to show the liability of the plaintiff as the maker, endorser, drawer or acceptor. And I should have no doubt, but for one of the late amendments, a like particularity and separation would be required under the Code. That the answer stating the defence of set off should state, as new matter, the facts constituting the cause of action or demand against the plaintiff as a set off, in the same manner and with the same particularity as those facts would be stated in a complaint. And when two or more notes, judgments or bonds, or other distinct demands are intended to be set off, each of them

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Ranney agt. Smith.

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should be separately and particularly described, with all the allegations or averments necessary to show the liability of the plaintiff, and so as to enable him in his reply to take issue by denying any of the material allegations pertaining to each note, judgment or bond, or other particular demand; or to avoid the same by alleging new matter. But all demands constituting the set off may be contained in the *same statement of new matter* in the answer. Each demand, which in a complaint should be separately stated as constituting by itself a cause of action, being separately described or stated with the necessary averments, and all constituting the defence of set off.

The recent amendment above alluded to, is in section 162. It is that "in an action or defence founded upon an instrument for the payment of money only, it shall be sufficient for the party to give a copy of the instrument, and to state that there is due to him thereon from the adverse party a specified sum, which he claims."

If it is intended by this to dispense with a statement of facts constituting the cause of action, or of new matter constituting a defence, it is a wide departure from the system of pleading as previously established by the Code. How are issues to be formed? May a complaint contain simply a copy of the note followed by the allegation that there is due to the plaintiff a certain sum and that he claims such sum. If so, upon what is the defendant to take issue? I design not to intimate how these questions may be decided, or whether the courts may not still require some allegation of the making of the note, &c., still giving effect to the 2d subdivision of § 142, and combining it with the amendment to § 162. In the present case the defendant has given copies of the notes which he proposes to set off, preceded by averments of the making and delivering of the notes; and I am inclined to think, under the Code as now amended, he has substantially complied with its provisions. The motion is denied, but without costs.



## SUPREME COURT.

COLE Respondent agt. STEVENS Appellant.

Property exempt from execution by the provisions of the Revised Statutes (2 R. S. 367), can not be taken upon execution issued upon a judgment rendered for other exempt property, under the act of 1842.

The provisions of the Revised Statutes in regard to property exempt from execution, are not affected by the additional act of 1842. Therefore an execution issued upon a judgment for the purchase money of exempt property, under the act of 1842, can not be made of exempt property under the Revised Statutes, nor the act of 1842.

The case of *Matthewson vs. Weller* (3 *Denio*, 52), so far as it seems to hold a different doctrine, overruled.

*Seventh District General Term, December 1851. WELLES, SELDEN and JOHNSON, Justices.* This was an action commenced in October 1848, in a Justice's Court of Wayne county, in which the plaintiff claimed to recover for the taking by the defendant of necessary beds and bedding, one table and six chairs; being property exempt to the plaintiff from execution by the Revised Statutes, he being a householder

The defendant justified the taking, as constable of the town of Palmyra, under and by virtue of an execution issued by Isaac E. Beecher, Esq. a justice of the peace of Palmyra aforesaid, upon a judgment rendered against the plaintiff for the purchase price of one cook stove and furniture, which stove and furniture were exempt from execution by the Revised Statutes, being the only one in use by the plaintiff in his family.

The above facts appeared in proof; in the course of the trial before the justice, a witness, Mesick, was asked the question whether the beds and bedding were necessary to the plaintiff in the state of his family? To which question the defendant's counsel objected. The objection was overruled, and the witness answered "they were." The witness further stated the plaintiff had six in his family; he had three beds; two of them were the ones that were taken; the sheets and other bedding were taken from the same beds. His family consisted of two sisters-in-law, two children, and himself and wife; the oldest child was about

three or four years old; the straw beds were under the feather beds.

On his cross-examination he testified he had no other beds besides these three in the house. The sisters-in-law had no other home; were grown up; the beds were in his possession.

A judgment was rendered by the justice in favor of the plaintiff for the value of the articles taken. An appeal was taken from the justice's judgment to the County Court of Wayne county, in which court the justice's judgment was affirmed, and the judgment of the County Court was brought by appeal to this court.

T. R. STRONG, on the part of the appellant, presented and argued the following points:

1st. The justice erred in allowing the question to the witness Mesick, as to the beds being necessary to the plaintiff (4 *Barb. S. C. Rep.* 256, 261, and cases cited; 4 *Denio*, 370; 1 *id.* 281).

2d. The justice erred in giving judgment for any amount in favor of the plaintiff it appearing in the proof that the property in question was taken by the defendant as constable, by virtue of an execution in due form, on a valid judgment against the plaintiff, rendered for the purchase money of property exempt from execution. The exemption laws do not extend to such a case (2 *R. S.* 367, § 22; *Laws of 1842*, ch. 157, § 1, p. 193; *Matthewson vs. Weller*, 3 *Denio*, 52; *Danks vs. Quackenbush*, 1 *Comstock*, 129, 136, 137).

S. K. WILLIAMS, on the part of the respondent, presented and argued the following points:

1st. The property levied on, and for which judgment was rendered, was not liable to seizure and sale under execution (*Sess. Laws of 1842*, p. 193, ch. 157; *Matthewson vs. Weller*, 3 *Denio*, 53; *Quackenbush vs. Danks*, 1 *id.* 129; *Danks vs. Quackenbush*, 1 *Comst.* 129, 133). The authority of a decision is coextensive only with the facts upon which it is made (12 *Wheat.* 333). The legislature did not intend to abridge and destroy, but to extend the privilege of debtors. The statute should consequently be so construed (*Senate Doc. of 1842*, vol. 3, No. 76; *Assembly Doc. of 1842*, vol. 7, No. 145; *Senate Doc. of 1842*, vol. 3, No. 81).

2d. The question to the witness Mesick, as to the beds being necessary, was properly allowed by the justice; but if not, the other testimony to the same point, of the same witness, is amply sufficient to sustain the judgment (*McAllister vs. Reab*, 4 *Wend.* 487, 489; *Reab vs. McAllister*, 8 *Wend.* 117, per Senator Allen; *Crary vs. Sprague*, 12 *id.* 41, 46, 47; *The People vs. Wiley*, 3 *Hill*, 195, 214; *Hayden vs. Palmer*, 2 *Hill* 205; *Vallence vs. King*, 3 *Barb. S. C. Rep.* 548). An error in the court below, which could do no injury, is not ground for reversal, nor where the defect is afterwards supplied.

The question of the necessity of those articles in regard to which the question was asked, is not disputed in the evidence in the court below.

By the Court, SELDEN, Justice.—This case depends entirely upon the construction to be given to the act of 1842, exempting from levy and sale upon execution, property to the value of \$150, in addition to that previously exempt by the provisions of the Revised Statutes. The other questions in the case are of no moment. Although the question put to the witness Mesick, was objectionable, as calling for the opinion of the witness instead of the facts in regard to the situation of the defendant's family, yet the answer gave fully the very facts concerning which the inquiry should have been made.

It is true the witness prefaced his statement of facts by giving his own opinion; but the facts stated would seem to justify it, and to be amply sufficient to warrant the justice in coming to the conclusion he did, without relying at all upon the opinion of this witness.

It does not appear to have been a point controverted upon the trial, and I do not think "substantial justice" would be promoted by reversing the judgment upon that ground.

What then is the true construction of the act referred to? The case of *Matthewson vs. Weller* (3 *Denio*, 52), in which this question was first presented, and in which the late Supreme Court expressed its opinion upon it, has given rise to considerable discussion of the point. Three different interpretations have been contended for:

1st. That the effect of the proviso is, that property otherwise exempt, shall not be protected from an execution on a judgment rendered for the purchase money of that identical property.

2d. That neither property exempt by the Revised Statutes, or by the law of 1842, shall be exempt from an execution issued to collect the purchase money of any property exempt by any law.

3d. That the additional exemption allowed by the act of 1842, shall not extend to executions issued to collect the purchase money of any exempt property whatsoever.

The first of these constructions is founded rather upon what it would seem reasonable that the legislature should have enacted, than upon any sound interpretations of the language of the section.

To sustain either this or the second construction above given, it is indispensable to assume that the words "such exemption," used in the proviso, refer as well to the exemption under the Revised Statutes, as to that allowed by the section itself.

But if that be assumed, for aught I see, we must adopt the second of the above constructions; and that is the conclusion to which the court seem to have arrived in *Matthewson vs. Weller*, above cited.

But this construction not only leads to some consequences which conflict entirely with the general scope and object of the act, but seem to me not to conform either to the natural or grammatical interpretation of its language. The ordinary rules on the subject would require that the words "such exemption" should be referred to the nearest antecedent, even if there were more in the same sentence to which it might by possibility refer. Here, however, there is but one *exemption* allowed by the entire section, to wit; that of property amounting to \$150, in addition to the exemption by prior acts. There is a reference, it is true, to articles previously exempt, but no exemption of such articles by this act. To sustain the construction contended for, therefore, it is necessary to travel out of the act itself, and refer the words in question in part to the provisions of the Revised Statutes.

I can not think that any rule of interpretation would warrant this. The natural reading of the clause seems to me clearly to be that the exemption allowed *by the section itself* shall not be



available against any execution issued to collect the purchase money of any exempt property whatever.

As the property taken in this case was exempt by the Revised Statutes and not by virtue of the law of 1842, the conclusion to which I have arrived, shows the judgment of the justice and of the County Court to be correct.

The judgment must, therefore, be affirmed.

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## SUPREME COURT.

GRIFFIN AND WIFE agt. GRIFFITH AND WIFE.

The act conferring upon the Recorder of the city of Troy, the powers of a justice of the Supreme Court at chambers (*Session Laws* 1849, p. 164, § 4) held to be unconstitutional and void.

*Albany Special Term, December 1851. Motion to set aside judgment, &c., for irregularity.* The action having been referred, and the referee having made his report, a copy of the report was served on the defendants' attorney on the 19th of November 1851. On the 28th of the same month the defendants' attorney obtained from the recorder of Troy an order enlarging the time to make and serve a case for twenty days, and staying the plaintiff's proceedings in the mean time. This order was served on the same day. On the 6th of December the plaintiffs' attorney, disregarding the order, perfected a judgment and issued execution. The order was disregarded upon the ground that the recorder had no authority to make an order staying proceedings upon a report of a referee. It was also insisted that the affidavit upon which the order was obtained was not served with the order. Affidavits were also produced on the part of the plaintiffs tending to show that if the judgment and execution are set aside, the plaintiffs would be in danger of losing their demand.

J. K. PORTER, *for Plaintiffs.*

J. A. MILLARD, *for Defendants.*

HARRIS, Justice.—I am satisfied from the papers before me, that a copy of the affidavit upon which the order staying proceedings was allowed, was served upon the plaintiffs' attorney with the order itself. He had no right, therefore, to disregard the order if the recorder was authorized to make it.

The act of 1849, in relation to the recorder of the city of Troy (*Sess. Laws of 1849*, p. 164, § 4), after declaring that that officer shall have and exercise the same powers which were conferred upon county judges by the 27th section of the act amending the judiciary act, (*Sess. Laws of 1847*, p. 642), and that he should further have and exercise, within the city of Troy, the powers conferred upon a county judge by that part of the Code which relates to proceedings supplementary to execution, proceeds also to invest him with "the powers of a judge of the Supreme Court at chambers." It then provides that in case of his absence or inability to act, the mayor of the city may exercise the same powers. The provisions of this statute, it is obvious, are broad enough to authorize the recorder to make the order in question, or any other order which might be made by a judge of the Supreme Court at chambers. The only question, therefore is, whether the legislature itself was authorized to confer this power.

The framers of the present constitution undertook, for the first time in the history of this state, to construct a complete judiciary system. In executing this design they created one court of general jurisdiction in law and equity. This court they called the Supreme Court. They also created a County Court and authorized the legislature to specify the cases in which it should have jurisdiction. They provided for the election of a county judge, who should have power to perform such duties as might be required by law. Provision was also made for the election, in certain cases, of other local officers who might also exercise such powers in special cases as should be prescribed by law. Under these provisions, the legislature is, it may be conceded, authorized to confer upon the officers to whom they apply, the powers of a judge of the Supreme Court at chambers.

But the constitution has not granted to the legislature authority to confer similar powers upon the judges of local city courts.

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Griffin and wife agt. Griffith and wife.

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It has merely provided for the continuance of such local courts as were at the time of the adoption of the constitution in existence in any city or village, and the creation of other courts in cities. The jurisdiction of such courts is restricted to cities. This, with the addition of a Court of Appeals and justices of the peace, constitutes the entire scheme of the constitution for a judiciary. The offices of chancellor, justice of the then existing Supreme Court, judge of the then existing County Courts, supreme court commissioner, &c., were all abolished. It is obvious that it was intended that all judicial power in the state should be possessed and exercised only by the courts and officers mentioned in the sixth article, and the local courts preserved by the 12th section of the last article.

The act under which it is claimed that the recorder of Troy acquired power to grant the order in question does, in fact, though not by name, create that officer a supreme court commissioner. It declares, in terms, that the recorder, and in certain cases, the mayor, shall possess and exercise the powers of a judge of the Supreme Court at chambers. This was precisely the office and duty of a supreme court commissioner. An officer possessing this power is, within the proper meaning of the term a supreme court commissioner. The legislature, therefore, by the act in question have, in fact, created a supreme court commissioner, and not the less have they done this, because he is not called by that term. It is true, that similar, though far less extensive powers have been conferred on county judges; but then there is an obvious distinction between the two cases. In the case of county judges, the constitution has expressly authorized the legislature to prescribe their powers, while, on the other hand it has, at least impliedly, withheld such authority in the case of the officers of city courts. Why, it may be asked, did the framers of the constitution declare that county judges *should perform such duties as might be prescribed by the legislature, if it was not intended that the like powers should not be conferred on other officers?* Why authorize the legislature to confer power upon a county judge, and not upon a recorder, if it was intended that the legislature might confer the same power upon each? The inference seems to me irresistible that it was not intended that

any officer, except those mentioned in the constitution should be authorized to perform any judicial duties pertaining to a judge of the Supreme Court. This inference is derived as well from the fact that the office of supreme court commissioner is abolished, as that express authority is given to the legislature to confer judicial powers upon the county judges and other local officers elected to perform their duties.

If an officer may be created and clothed with the powers of a supreme court commissioner, why may not the legislature create another officer and invest him with the powers of a chancellor? The one office is not more effectually abolished than the other. If it was intended to abolish the functions of those offices as well as the name, then the legislature have no longer the authority to confer the powers pertaining to those offices upon any person not embraced within the provisions of the constitution.

The constitution has declared what officers are competent to hold a general term of the Supreme Court, and who may hold a special term or circuit court. But it has left the powers of these courts respectively to be prescribed by the legislature. The Supreme Court, being vested with general jurisdiction in law and equity, may exercise that jurisdiction in such manner as the legislature may prescribe. It is for the legislature to determine what proceedings shall be had at a general term, and what at a special term or circuit. It may also authorize such portion of the jurisdiction vested in the court as it may deem proper, to be exercised by the judges of the court at chambers. It can not authorize a county judge to hold a circuit or special term, for the constitution has declared who shall hold such courts; but it may, I think, authorize county judges to perform such duties as a judge of the Supreme Court may perform out of court, because this power seems by the terms of the constitution to which I have already referred, to have been committed to the legislature. But for the clause in the 14th section of the sixth article, which declares that county judges may perform such other duties (which I understand, from the connexion in which the provision is found, to mean judicial duties) as may be required by law, I should have little hesitation in saying that the duties of a judge of the Supreme Court could not be delegated to any other officer.



If the authority conferred upon the recorder and mayor of Troy by the act in question, is consistent with the provisions of the constitution, then there is no restriction to the power of the legislature to create supreme court commissioners. However extensive the powers it may see fit to bestow upon a judge of the Supreme Court at chambers, all those powers may also be bestowed upon every justice of the peace in the state. The only difference between the two officers, in point of jurisdiction, would be that the latter might not constitutionally sit in a general term of the Supreme court, or hold a circuit court or special term. How far the proceedings of a judge at chambers, or a justice of the peace performing the duties of a judge at chambers might be reviewed in such courts, is also a matter resting in the discretion of the legislature. I am persuaded that the framers of the constitution never contemplated this unlimited expansibility as an attribute of the only court of general jurisdiction created by them.

It is with regret that I find myself brought to the conclusion that the law assuming to confer these powers upon a very competent officer, is in violation of the constitution. But it is matter of history that the multiplication of supreme court commissioners throughout the state, was one of the objectionable features of the system which was abrogated when the present constitution was adopted. It was this fact, undoubtedly, which led the convention to erect the barrier which I think I have shown to exist in that instrument against the repetition of this evil. I feel constrained, therefore, though aware of the inconvenience which may result from the decision, should it finally be sustained, to hold that the act conferring upon the recorder of Troy the powers of a judge of the Supreme Court at chambers is unconstitutional, and of course that the order staying the plaintiff's proceedings in this case was void.

But as the defendant's attorney has acted in good faith, he must still be permitted to make and serve a case for the purpose of reviewing the decision of the referee, for which purpose he may be allowed twenty days. All proceedings upon the judgment and execution are to be stayed in the mean time, and if the case is served, until the same is settled. Neither party is entitled to costs upon this motion.

## SUPREME COURT.

## WILLIS agt. TAGGARD.

The defendant in an action under the Code, can set up in his answer matter falling short of a defence, by way of recoupment in mitigation of damages. An answer should cover all it professes to answer and no more. *It seems a set off* may be set up by answer, although it be not claimed as a full defence. It is good as far as it goes.

*Essex Special Term, July 1851.* The first count in the complaint is, among other things, for a large quantity of brick sold and delivered by the plaintiff to the defendant, and the several items are set out as in a bill of particulars, together with the time when they were delivered and their value; and it claims that \$696·68 remains due therefor to the plaintiff.

There are four other counts, to wit: one for goods sold; one for work and labor; one for money lent, and one for money had and received; and the complaint concludes with demanding a thousand dollars damages.

The amended answer denies that the plaintiff ever sold to the defendant the goods and chattels mentioned in the complaint, or any part thereof, and denies that he was indebted to the plaintiff therefor in the sum of \$696·68. It also denies the indebtedness set up in each separate count.

It then sets up by way of recoupment, that in the winter of 1850 the parties entered into a contract by which the plaintiff agreed to furnish the defendant a quantity of brick at a price agreed upon for the purpose of building a hotel at Keeseville in the county of Essex, a part of which brick were to be of a size and quality similar to a model then exhibited to the plaintiff, and the balance to be good merchantable brick, of the usual size. That in pursuance of the agreement, the plaintiff furnished the defendant brick sufficient to build the hotel, which are a part of the brick mentioned in the complaint, and the defendant avers that the brick which were to be made after the model were not of the size or quality of said model, but on the contrary were too small and not well burnt, and were not all of

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Willis agt. Taggard.

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the same size, but uneven and of different sizes; nor were the balance good merchantable brick, but were made of bad materials, not well burnt, small and uneven and not of uniform size; by reason whereof the defendant had to furnish more lime and brick, and pay the masons greater wages, and the walls were less substantial than they otherwise would have been, and the defendant thus sustained damages to the amount of seven hundred dollars, which damages the defendant will recoup, and give the same in evidence in mitigation of damages claimed by the plaintiff for said brick, &c.

The plaintiff has demurred to this part of the answer, and has assigned a great number of causes of demurrer.

———, *for Plaintiff.*

———, *for Defendant.*

WILLARD, Justice.—The objection that this part of the answer does not, in terms, refer to any one count in the complaint in particular, is not well taken in fact. There is but one count which seeks to recover for brick sold, and this is set up as a defence to so much of the complaint as relates to brick. It would have been more lawyer like to have referred to it as the first count of the complaint, or to such part of that count as related to brick. But it is obviously inapplicable to any other count. The answer is not very definite in its statements; but if the plaintiff did not understand by it the precise nature of the defence intended to be made, he should have applied to the court, under § 160, for an order requiring the pleading to be made more definite and certain. This proceeding is in the nature of an exception for insufficiency, and can not be taken after pleading over.

The *formal* objections to this part of the answer are none of them sufficient to render it null and void.

The main question in the case is, whether a defendant can, under the Code, set up in his answer matter falling short of a defence, by way of recoupment in mitigation of damages?

The general rule of pleading is, under the Code, that an answer **must** either contain a denial in some form authorized by the Code, of the matter of the complaint, or a statement of new matter,

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*constituting a defence* (Code, § 149). When the answer contains new matter, the plaintiff may reply, denying it, or he may allege new matter not inconsistent with the complaint, in avoidance of it; or he may demur to it for insufficiency, stating the grounds thereof (Code, § 153). The plaintiff on the present occasion has demurred for insufficiency; and he insists that because the matter of recoupment is not claimed to be a full defence to the complaint, but merely in mitigation, it is bad upon demurrer for that cause.

This presents a new question which I am not aware has been settled by any of the courts.

Under the former rules of pleading it was generally understood that when matter of total or partial defence could not be pleaded it might be given in evidence without plea (Wilmarth vs. Babcock, 2 Hill, 194; Co. Lit. 283, a ; 21 Wend. 277). The only exception to this rule that occurs to me is that evidence by way of recoupment, was not admissible unless notice of the defence was given (Barber vs. Rose, 5 Hill, 76). The English practice formerly required no notice, but admitted the evidence in mitigation under the general issue (see per COWEN, J. 5 Hill, 79). Our statute relative to notices with the general issue, required a notice only of such matters as, if pleaded, would be a bar to the action (2 R. S. 352, § 10). The Supreme Court, in Barber vs. Rose, *supra*, by requiring notice of matter of recoupment, exacted more than the statute had enjoined, and more than the ancient English practice demanded. Nevertheless, the court doubtless had the power to require a notice, and it seems to be necessary to guard against surprise (see Barton vs. Miller, 7 East, 479; 5 Hill, 79; 2 R. S. 199).

The Code, § 140, abolished all the forms of pleading previously existing, inconsistent therewith. All the former practice, which is consistent with the Code, still remains in force (§ 468, 469). As there is now no general issue under which a recoupment can be given in evidence, nor to which a notice can be subjoined, there is no way in which a partial defence can be taken but by answer. It surely was not the intention of the legislature to abolish the partial defence of *recoupment*. They have not abolished a set off, and the latter frequently falls short



of a full defence (2 R. S. 354, § 18, 22). If every answer which does not set up a full defence, be bad on demurrer, an answer claiming a partial set off can not be sustained. This construction of the Code will lead to consequences which probably were not anticipated. Full effect may, however, be given to the Code, by holding that an answer claiming to set up a full defence, and falling short of it, is demurrable. Such was the former rule of pleading. But if the answer claims no more than the facts which it affirms will justify, it is clearly a defence as far as it goes, though not necessarily a defence to the whole action. An answer, like a plea, should answer all that it professes to answer, and no more (*Co. Lit.* 303-9; 1 *Chitty Pl.* 509). The answer, in the present case, does not claim that the matter pleaded is a bar, but merely proposes to recoup, and to give the matter in evidence in mitigation of damages. It is not obnoxious to a demurrer, but the plaintiff will be entitled, when there is no other answer, to take judgment for the part of the count which is left unanswered (1 *Story*, 303; 1 *Saund.* 28, n. 3). The fact that there are other answers in this case, which prevent the plaintiff from taking such judgment, does not invalidate the answer in question. It is good as far as it goes; and there does not appear to be any other way, under the Code, that a recoupment can be made available.

It is not improbable that the plaintiff was led to demur by the decision of the Court of Appeals, in *Nichols vs. Dusenbury* (2 *Comst.* 283). That action was commenced before the Code, and the pleadings were governed by the former practice. A recoupment under the old system, could not be *pleaded in bar*. It was matter of evidence under the general issue, provided notice thereof was given (*Barber vs. Rose*, 5 *Hill*, 76).

The demurrer is not well taken, and must be overruled; but as the practice is new, the plaintiff is allowed to reply within twenty days; and the costs of the demurrer must abide the event.

## SUPREME COURT.

THE PEOPLE ex rel. MOORE agt. BANFIELD AND BANISTER.

The *inhabitants* of a school district have no power to appoint and invest a building committee with authority to advertise, or make a contract for building a school house, or to do any other act binding upon the *trustees*, without their consent.

The statute prescribes the powers and duties both of the inhabitants and the trustees. The *inhabitants* have the power to levy a tax on the taxable inhabitants for the purpose of purchasing or leasing a suitable site for a school house, and for building it, or for hiring or purchasing a school house, and for furnishing and keeping it in repair, and here their power ends.

The *trustees* are then to purchase or lease the site, build the school house, &c.

*Chemung Special Term, April 1852.* The relator and the defendants were trustees of school district No. 2, in Erin. The inhabitants of that district, as appears by the relator's statement of the facts, at a regular school meeting held on the 28th of October 1851, resolved to build a school house, and defray the expenses thereof by a tax upon the district; a building committee was appointed by the meeting with power to advertise the letting of the job of building the school house to the lowest bidder; that it was let by a portion of the committee with the assent of the others, for \$185. At a subsequent meeting of the inhabitants, held on the 8th of December 1851, a resolution in confirmation of the acts of the building committee was passed to sell the building of the house to Joseph Woolever for \$185, that being the sum bid by him for building of the same. The relator, as one of the trustees, called upon the defendants to unite with him and as trustees make out a tax list and warrant, for the purpose of raising the funds necessary to pay for building the school house at the price for which it had been let; they declined, and now a mandamus is asked to compel them to do so. The fact that a building committee was appointed by the inhabitants with power to advertise for the letting of the contract for building the house was denied by the defendants, as was also the statement of the relator, that he requested them to unite with him in making a tax list and warrant. They also denied the

The People ex rel. Moore agt. Banfield and Banister.

introduction and passage of the resolution of the 8th of December 1851, although they admit that such a resolution appears upon the records of the proceedings of the inhabitants of said district, kept by the clerk thereof.

HART & VAN DERLYN *for the Motion.*

DUNN & PATTERSON, *Contra.*

H. GRAY, Justice.—Assuming the facts to be in all respects as stated by the relator, they are not sufficient to uphold this motion. The resolution of 28th October 1851, to build a house and raise the money to pay for it by tax, did not specify the amount to be raised. Whether this resolution invested the trustees with authority to contract for building the house, is not now necessary to be considered; if they had the power they did not exercise it, and hence no data is furnished fixing the amount for which a tax could be assessed, unless it has been done by the action of the building committee, or by the inhabitants at their meeting held on the 8th December last.

The statute conferring upon and regulating the powers of the inhabitants, and the powers and duties of trustees of school districts, has clearly defined the powers of the one and the powers and duties of the other. The inhabitants have the power to levy a tax on the taxable inhabitants of the district for the purpose of purchasing or leasing a suitable site for a school house, and for building or hiring or purchasing such school house and keeping the same in repair, and furnishing it with the necessary appendages (*Rand. Com. School System*, p. 111, § 62); this being done, their power in respect to providing a school house is at an end, and that of the trustees begin; having been provided under the power given to the inhabitants with the means, they are to purchase or lease the site designated by them for a school house, and build, hire or purchase one and keep it in repair, and furnish it with the necessary appendages (*id.* § 103). The inhabitants and trustees are alike dependent upon the statute for all the powers they can legally exercise; no power is given to the inhabitants to invest a building committee with authority to advertise for, or make a contract for building a school house, or to do any other act binding upon the trustees without their assent.

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Webb agt. Mott.

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If, therefore, there was a building committee who acted in all respects as the relator has stated, their action was without legal authority, and was in no respect binding upon the trustees; and if the resolution of the 8th of December is as conclusive evidence of its verity as the counsel for the relator claims it to be, it does not strengthen this application; it clearly was not a resolution to levy a tax for the purpose of building a school house, or an amendment of the former resolution proposed and passed to limit the cost of the house, and thus limit the discretion of the trustees in the amount of their expenditure. It was a mere acceptance of Woolever's offer to build the house for \$185; or, in other words, a contract with him to build a school house for that sum, so far as an offer and its acceptance could make it so, and nothing more. This clearly was not within the power conferred upon them by statute. If this resolution was ever passed by the inhabitants, they mistakenly assumed the exercise of a power not conferred upon them, but confided alone to the trustees. The motion must be denied with ten dollars costs.

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SUPREME COURT.

WEBB agt. MOTT.

As under the former practice, so, under the Code, "that after a *general appearance* by the defendant, he can not be heard objecting on account of the *irregularity of the process* by which the action was commenced." (*See the authorities cited in the case.*)

*Otsego Special Term, March 1852.* Mr. FIELD, of counsel for the defendant, moved to set aside the summons and complaint in this action for irregularity.

G. A. STARKWEATHER, *Opposed.*

CRIPPEN, Justice.—The summons is not in conformity with the provisions of the Code. The complaint which was served on the defendant with the summons, sets up a cause of action



not arising on contract, but one founded in tort for a malicious arrest and prosecution of the plaintiff, and claims damages therefor.

Under such a complaint the summons should have contained the notice required by section 129, sub. 2 of the Code. In short there is no doubt but that the summons in this case is irregular and should be set aside, unless the irregularity has been waived or cured by the acts of the defendant or his attorney, since the service of the summons and complaint on the defendant.

It appears from the affidavits in this case that the summons and complaint were served on the defendant on the 23d day of February 1852; that on the same day the defendant employed an attorney of this court to defend the action, and the attorney of the defendant swears in his affidavit that on the 24th day of February 1852, "he served a notice in writing on the plaintiff's attorneys that he was retained by the defendant to defend this action."

The 7th rule of this court declares that the service of notice of appearance, or retainer generally, by an attorney for the defendant, shall in all cases be deemed an appearance. The notice of retainer in this case was general and not limited or special. If the defendant intended to retain the attorney for the special object or purpose of making a motion to set aside the plaintiff's proceedings for irregularity, a notice of such limited or special retainer would not have been deemed or taken as a general retainer and appearance in the action.

Rule 7, of this court, recognizes by its very language a special or limited retainer, and which would not be deemed an appearance in the action on the part of the defendant. But in this case it is entirely clear that the defendant appeared generally in the action, and the plaintiff on filing the notice of retainer of the defendant's attorney, may have the appearance of the defendant entered as of the time when such notice was served (*Rule 7*).

It is insisted on the part of the plaintiff that the appearance of the defendant generally in the action, is a waiver of the irregularity in the summons, and cures the defect in the plaintiff's proceedings.

I am satisfied on an examination of the authorities that the

practice of the court has been for a long time settled that a defect or irregularity like that on which this motion is founded, will not be regarded after the defendant has given notice of appearance generally in the action.

The case of *Mulkins and Bennett vs. Clark* (3 *How. Pr. R.* 27), was a motion to set aside a *capias ad respondendum* for irregularity, for an omission to endorse a reference on the writ to the statute as required in actions for penalties, that being an action to recover the penalty for a violation of the excise laws. The writ in that case was served on the defendant on the 16th of January 1847. On the 19th, the defendant's attorney served a general notice of retainer for the defendant in the action upon the plaintiff's attorney. *BRONSON*, chief justice, denied the motion to set aside the writ with costs; on the ground that the defendant had appeared generally in the action, and by so doing waived all irregularity in the process.

The case of *Pixley vs. Winchell* (7 *Cow. R.* 366), was a motion to set aside the *capias* which was tested as of August term, 1826, and made returnable the 18th of October 1827, more than one year after the teste of the writ. The defendant put in special bail before the irregularity was discovered by him. The court denied the motion on the ground that the defendant had taken a step by which he was regularly in court, whether there by any process or not. Notwithstanding the defendant put in bail and thus appeared in the action in ignorance of the irregularity in the writ, the court held that he had waived the irregularity and denied the motion.

The case of *Dix agt. Palmer and Schoolcraft* (5 *How. Pr. R.* 233), was a motion to set aside the judgment entered by the plaintiff for a defect in the summons in omitting to state the court from which it emanated. Justice *GRIDLEY*, in deciding the motion, uses the following language: "That the defect in the summons would be a fatal objection to the judgment, had not the defendant's attorney given a general notice of appearance and thus waived the irregularity. The defendant having appeared in the action generally, admits himself to be *regularly in court*, and therefore all defects in the summons and its service, and even the total omission of any summons at all, becomes immaterial

The defendant has taken a step in the action which admits that he is regularly brought into court."

The case of *Gardner vs. Teller* (2 *How. Pr. R.* 241), was a motion to set aside a declaration and notice to plead thereto in ten days, instead of twenty days. It appeared that the defendant on the next day after the service of the declaration and notice on him, employed an attorney to defend, who immediately served a notice of retainer on the plaintiff's attorney in the action. Chief Justice BRONSON denied the motion, with costs, on the ground that the defendant's attorney had served a notice of retainer generally, which is an appearance by the defendant in the action. Serving the declaration with notice to plead thereto in ten days instead of twenty days, was irregular; but an appearance in the action is a waiver of irregularities in the process to bring the party into court.

The case of *Rowley vs. Stoddard* (7 *John. R.* 207), decides that the appearance of Stoddard in the action commenced against him in Vermont cured all irregularities if any had been committed in the commencement of the suit (17 *John.* 63).

In the case of *Fox vs. Money* (1 *Bosanquet & Puller*, 250), a motion was made to set aside the proceedings for irregularity, on the ground that the writ was tested on a wrong day. The plaintiff's counsel objected to granting the motion on the ground that the defendant had not appeared in the action, and therefore was not in court and could not make the objection. The court decided that the defendant should make the motion in the first instance, or, in other words, before appearing generally in the action.

The practice of the court has been settled and uniform for a great length of time, and is in conformity with the practice of the English courts, that after a general appearance by the defendant, he can not be heard objecting on account of the irregularity of the process by which the action was commenced.

I deem it now too late for the court to establish a new rule of practice in such cases unless it is imperiously necessary to do so for the protection or enforcement of some right of the party seeking relief, which I have not been able to discover as existing in this case. The defendant can not suffer or be in any wise injured

by the variance between the summons and complaint, in this action. The complaint contains the cause of action and the defendant is informed thereby of every fact necessary for him to know in order to protect himself against an unfounded claim, if it be such. I have come to the conclusion that this motion must be denied with seven dollars costs.

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## SUPREME COURT.

### WESTON agt. HATCH Executor, &c.

In an action against an executor, for work, labor and services done for the decedent, a *residuary legatee* under the will, is a competent witness for the executor. The witness has not such an *immediate benefit* in the action, as would authorize his examination under § 396 of the Code.

*Onondaga General Term, November 1851.* PRATT, GRIDLEY, ALLEN, and HUBBARD, *Justices*. This was an action for work and labor performed by the plaintiff for the decedent. It was tried before a referee. On the trial Loretta Hatch was offered as a witness for the defendant and objected to on the ground that she was one of the *residuary legatees* under the will of the decedent; the objection was sustained.

H. C. VAN SCHAACK, *for Defendant*.

SEDGWICK, DILLAYE, & THORN, *for Plaintiff*.

By the Court, HUBBARD, Justice.—Prior to the Code, the incompetency of a residuary legatee in behalf of personal representatives, was undisputed (7 Cow. 64, Campbell vs. Tousey). He had a direct interest to sustain or defeat a recovery, because affecting the residuum of the estate in which he was a participant. But we think the referee erred in applying the former rigid common law rule to a case like the present under the Code, or in holding that a residuary legatee of a solvent estate was immediately interested, and therefore incompetent as a witness.

Under the Code no interest disqualifies, except as applied to a party to the action, or to a person for whose *immediate benefit*



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Weston agt. Hatch.

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the action is prosecuted or defended (§ 398, 399). When not a party, the latter section applies to a person, standing in close legal relationship—in *pari materia*—to the party to the action, and for whom the party would hold the fruits of the judgment as trustee. For instance a *cestui que trust* or *ward*, when the trustee or guardian prosecutes or defends.

It may be stated as a safe rule, to regard those only as *immediately benefitted*, who, though not named as parties, may nevertheless be examined *as such*, by the party adverse in interest, under section 396. A residuary legatee certainly could not be called to the stand under this section. He has a clear interest in the question and in the event of the suit, but it is remote and future; with more propriety it may be said that his interest is rather in the ultimate effects of the judgment in the action, than in the action itself.

It was the intent of the legislature to change, radically, the law of evidence as to the competency of witnesses; to discard the common law test of a pecuniary interest in the event of the suit, and to exclude only parties to the record, and those who are *quasi* parties by reason of an immediate beneficial interest. This is obvious from the use of the term "*immediate benefit*" as distinguished from a resulting or collateral interest in the event.

If a legatee interested in the residuum of an estate is incompetent under the Code, then almost every conceivable interest in the result of the controversy would disqualify. His interest is no more certain or immediate than that of a creditor of an insolvent intestate's estate, in behalf of an administrator (4 *Denio*, 88, *Flinn vs. Chase*). But it would not be contended that such creditor is incompetent under the Code. He has no immediate interest in the sense of the Code, but he has a clear and fixed interest in protecting the fund from which he is to receive a distributive share. His relation to the distributive fund is precisely analogous to that of a legatee to the residuum, and both are competent witnesses under the present law.

The referee, we think, erred in this case in rejecting the residuary legatee as a witness in behalf of the personal representative of the deceased, and that a new trial must be granted, with costs to abide the event.

## SUPREME COURT.

MORSE agt. EVANS.

A bill of exceptions should be settled, signed and sealed by the justice or court to whose decisions the exceptions were taken.

Where a justice of this court dies pending the settlement of a bill of exceptions taken to his decisions, the party will be allowed to make a case containing the exceptions, which may be settled by any justice of the court.

*Albany Special Term January 1852.* This action was tried at the Erie circuit in April 1851, before the late Mr. Justice SILL. The plaintiff had a verdict. The defendant's attorney, within the time allowed for that purpose, prepared and served a bill of exceptions to which amendments were proposed. Notice of settlement was given, but before the settlement could be had, Judge SILL died. Upon these facts the defendant moved for an order directing the bill of exceptions to be settled in such manner as to the court should seem proper, or for such other relief in the premises as the court should think proper to grant.

A. J. COLVIN, *for Plaintiff.*

J. K. PORTER, *for Defendant.*

HARRIS, Justice.—I do not think it is in the power of the court to grant the defendant the specific relief he seeks. It is an essential element in a bill of exceptions that it should be signed and sealed by the judge or court to whose decisions the exceptions are taken. The court have no power to dispense with this requisite, or to substitute any thing else in the place of it (2 R. S. 422, § 75, 76, 77, 78; Radcliff vs. Rhan, 5 Denio, 234; Law vs. Jackson, 8 Cow. 746).

But I think the defendant presents a case which entitles him to such relief as the court is able to afford. I can see no objection to his being allowed to make a case by means of which he can probably obtain the judgment at least of this court, in general term, upon the questions he intended to present by his bill of exceptions. Such a case might be presented upon affidavits,

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Blood agt. Wilder.

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in analogy to the provisions of the statute providing for the review of the judgment of a justice of the peace who has died (2 R. S. 272, § 262). But it would probably be still better to have a case settled by one of the justices of this court.

An order may, therefore, be entered authorizing the defendant, within thirty days to serve upon the plaintiff's attorney a case containing the exceptions taken by him upon the trial. The plaintiff to have twenty days after the service of such case to propose amendments. If the amendments are not assented to, the defendant may, within ten days, notice the proposed case and amendments for settlement according to the practice of this court, before any justice thereof. Upon such settlement the defendant shall furnish the judge with the minutes of trial kept by Judge Sill, or a copy thereof. Either party may also present to the judge upon the settlement, affidavits in respect to any thing which occurred upon the trial. The case so to be settled is to be deemed a case made and settled according to the rules and practice of this court. Neither party is to have costs upon this motion.

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## SUPREME COURT.

BLOOD agt. WILDER.

On an appeal from an inferior court to the Supreme Court, the respondent should have information of the residence of the sureties.

*It seems* the undertaking must state their residence.

*Essex Special Term, March 1852.* A. POND, moved to dismiss an appeal from the judgment of the County Court reversing the judgment of a justice.

It appeared that a certificate of a justice of this court had been obtained and filed.

An undertaking was also acknowledged and filed, and the sureties had justified; but it no where appeared in the undertaking or acknowledgment or justification, where the sureties resided.

Notice that the plaintiff appealed, with a copy of the undertaking had been served; but no copy or notice of the judge's certificate, nor copies of the acknowledgment or justification by the sureties, nor notice of their residence or additions had been given.

S. C. DWYER, *Contra*.

HAND, Justice.—It would seem Mr. Justice EDMONDS understands the practice to be, particularly on an appeal from an order, to serve copies of all the appeal papers (*Beach vs. Southworth*, 6 *Barb.* 173). No doubt this would be more convenient to the profession; or, at least, to require notice of filing the certificate required by § 344, together with a copy of the undertaking, and notice of the names, residence and addition of the sureties.

Perhaps no notice need be given of the judge's certificate (see 22 *Wend.* 627). But, however that may be, § 340 requires that a copy of the undertaking, including the names and residence of the sureties be served. The sentence is blindly expressed, but it is pretty difficult to see how a copy can include the residence of the sureties unless included in the original.

The undertaking in this case does not state the residence of the sureties, nor did any of the papers on the appeal.

It is contended that this is unnecessary on an appeal to this court from an inferior court; but § 245 requires security to be given "in the same manner" as in § 340; and if that undertaking must contain their residence, the same is required by § 345. At any rate, I think the respondent should, in some way, have notice of the residence of the sureties. It would sometimes be difficult to ascertain their ability, &c. without this information (see 2 *R. S.* 595, § 34).

The motion must be granted, but with leave to amend.



## SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK agt. COOK.

In an action in the nature of a quo warranto, the place of trial may properly be laid in any county in the state. The People are a party whose residence extends to every county.

*Cayuga Circuit, February 1852.* This was an action in the nature of a *quo warranto*, against the defendant, for an alleged usurpation of the office of treasurer of the state of New York; and the place of trial named in the complaint was Tompkins county. A motion was now made by the defendant for a change of the place of trial to Albany county, on the ground that the defendant resided in that county at the commencement of the action.

W. L. LEARNED, *for Defendant.*

GEO. RATHBUN, *for Plaintiffs.*

SELDEN, Justice—Denied the motion, on the ground that the residents of Tompkins county were parties to the action, and therefore that the place of trial was properly laid in a county where part of the plaintiffs resided.

## SUPREME COURT.

GARDINER AND OTHERS agt. CLARK.

The distinction between pleas in *abatement* and pleas in *bar* are not abolished by the Code (1851).

Therefore an objection in the nature of a plea in abatement can not be taken in a *general answer*, and is waived by an answer upon the merits.

*Oswego General Term, April 1852.* ALLEN, HUBBARD and PRATT, Justices. *Action upon contract by plaintiffs claiming as assignees.* The defendant in his answer set up several matters in bar, and then averred the commencement of an action by *capias* in 1847 by the original party in interest (the plaintiff's assignor) and that such suit was still pending. Upon the trial of the cause before Justice MONSON, at the Madison circuit, the defendant proved the pendency of the former action as alleged, and the justice directed a non suit to be entered.

HIRAM DENIO, *for Plaintiffs.*

THOMAS BARLOW, *for Defendant.*

W. F. ALLEN, Justice.—The first question to be considered is, whether matter in abatement and matters in bar can be put forth in the same answer. Prior to the enactment of the Code the order of pleading at common law was well established. The defendant could plead 1st, to the jurisdiction; 2d, in abatement; and 3d, in bar. Pleading in either class was an admission that there was no ground for pleading in the preceding classes and a waiver of the right to do so (*Gra. Pr. 2d ed.* 224). A plea in abatement could not be pleaded after a plea in bar; neither could these pleas be interposed together (1 *Mass.* 347; 1 *J. Cases*, 101; 13 *Wend.* 285; 2 *Cow.* 417). In the cases cited the rule was applied to pleadings in justices courts, where there has been great laxity and great liberality to secure substantial justice between suitors. The pendency of another suit for the same cause of action is conceded to be mere matter in abatement and not in bar (3 *Johns.* 259; 18 *id.* 257).

Has this rule of the common law been abrogated? If not, the defendant had waived his right to insist upon an abatement of the action for the cause alleged by answering to the merits, and the learned justice erred in non suiting the plaintiff. It has been repeatedly held, and, as I think, beyond all question correctly, that all preëxisting rules of pleading, not expressly or by necessary implication abrogated by the Code, are still in force (3 *How.* 407; 4 *id.* 119, 317; 5 *id.* 216; 7 *Barb.* 81). The common law rules applicable to pleadings, and the judgments to be given thereon not inconsistent with the provisions of the Code, and in cases not expressly provided for, must still be followed. Indeed, I am not aware that it is claimed in behalf of the Code, that there is no law for the government of courts and suitors in matters of pleading and practice outside of that statute. The Code is express, and only repeals such statutory provisions as are inconsistent with it (*Code*, § 468), and it will be seen that it is equally cautious in abolishing the common law rules upon the subjects treated of. It only abolishes the *forms* of pleading theretofore existing *inconsistent* with its provisions and *modifies* the forms of pleading and the rules by which their sufficiency is to be determined to the extent prescribed by the act (§ 140). It cautiously refrains from blotting out the entire common law on the subject of pleading at large. Its provisions are expressly restricted to modifying the forms of pleadings and the rules for determining their sufficiency. The question before us relates neither to the form or sufficiency but to the order and effect of pleading by the defendant—a subject which the Code does not profess to regulate. The common law upon this subject is not therefore inconsistent with the Code. By § 144, the defendant is permitted to demur to the complaint for any one of six specified causes; and by § 147 it is provided that when any of the matters enumerated as causes of demurrer do not appear upon the face of the complaint, the *objection* may be taken by answer. The matters which may thus be objected by answer are either by accident or design, arranged in the precise order in which at common law the same matters may be pleaded. The first is to the jurisdiction; the three following are in abatement; the fifth answers to a demurrer in equity for multifariousness, and can not

well be taken by answer, as it must necessarily appear by the complaint, if it exists; and the sixth is to the merits, and to this cause § 147 is not applicable.

The only matters which by § 147 can in practice be objected by answer are to the jurisdiction and in abatement, and these are not allowed to be taken as *defences* in the general answer of the defendant, but as *objections* by answer; that is, by setting up such matters alone in the same manner as under the former practice they would have been alleged by plea in abatement and not otherwise. By § 148 it is provided that such objections if not thus taken shall be deemed to be waived. So far from the provisions of the Code being inconsistent with the rules of the common law regulating the order of pleading they by implication prescribe the same order, and under the Code as well as at common law matters in abatement are waived by an answer upon the merits. Had it been intended to allow matters of this nature to be set up as one of several *defences* in the general answer of the defendant, they would have been mentioned in the chapter treating of the answers as "*defences*," and would not have been mentioned as an "*objection*," to be taken by answer. They would have been spoken of as "*defences*" and not as "*objections*." It may be said that the Code (§ 150) authorizes the defendant to set forth by answer as many *defences* as he may have. But it does not follow that "*defences*" and dilatory "*objections*" are the same. The next clause of the section shows that the legislature by *defences* intended such matters as go to the cause of action. A similar statutory provision has for a long time been upon our statute books (1 R. L. 519, § 10; 2 R. S. 352, § 9); and the distinction between pleas to the jurisdiction, in abatement and in bar, has nevertheless at all times been recognized, and could not be pleaded together as *defences* to the action. If we are at liberty to look at the results which would follow the practice adopted in this case, we can well see there would be great difficulty in administering justice so as to save the rights of parties. The Code has not made provision as to the form of the judgment to be given upon the allowance of the objections referred to, whether taken by demurrer or answer. The common law judgment must, therefore, be given in such



cases, and if the objection is taken by demurrer or separate answer, no difficulty will exist. But if taken as in this case, and issue be joined upon the facts alleged in abatement as well as upon those alleged in bar, and the cause be tried by a jury who render a general verdict as they may (*Code*, § 261), against the plaintiff, it will be final although it may in truth be founded upon matters not affecting the merits.

There was no serious inconvenience in equity in allowing certain objections as for a want of parties, and of that character to be taken in the answer. The complainant by such objections had notice and an opportunity to amend his proceedings, and upon the final hearing the court could model the decree and regulate the costs so as to do entire justice and protect the rights of all. These objections were not strictly matters in abatement but rather to the further progress of the action until the other parties were brought in. All declinatory and dilatory pleas are properly pleas, if not in abatement, at least in the nature of pleas in abatement, and therefore in general the objections founded thereon must be taken *ante litem contestatione* by plea and are not available by way of answer or at the hearing (*Story Eq. Pl.* § 708, 736 *et seq.*) In admiralty it would seem that all matters whether in bar or abatement *may* find a place in the general answer of the defendant (*Conkling's Ad. Pr.* 583-4). Still this practice is not universal and a different course is recommended by Judges Ware and Story (*The William Harris Ware's R.* 367; certain logs of mahogany, 2 *Sum. Rep.* 592). In the case last cited the objection was the same as in the case at bar, to wit, the pendency of another suit substantially for the same cause of action; and of this objection Judge Story says: "It being preliminary in its character it should have been taken, if at all, by a special plea in the nature of a plea in abatement, known in the ecclesiastical and admiralty courts by the appellation of a dilatory or declinatory exception, which is always brought forward before the *contestatio litis* or general defence in bar, or general answer upon the merits." With the common law mode of trial by jury there is great reason for retaining the common law rules regulating the order and effect of pleadings; but whether reasonable or not, so long as they are not abrogated by statute,

we are bound to abide by them and give them effect. I am satisfied that the legislature have not expressly or by implication abolished the distinction between pleas in abatement and pleas in bar, and that an objection in the nature of a plea in abatement can not be taken in a general answer of the defendant and is waived by an answer upon the merits.

The judgment must be reversed and a new trial granted, costs to abide event.

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## SUPREME COURT.

SANDS Administrator agt. SANDS.

Where the plaintiff set forth nineteen different claims against the defendant and demanded judgment for \$3000; and on a reference, it appeared that a portion of the claims were unfounded, and the referee reported \$1161.02 due the plaintiff, *held*, that the plaintiff was not entitled to a *per centage*, by way of indemnity, although it appeared that the hearing consumed a portion of four days.

If the trial was of extraordinary length, it was made so, by causes, for which the defendant was not alone responsible.

*(There are a variety of opinions and decisions upon this question of the allowance of a per centage by way of indemnity in difficult and extraordinary cases. The decisions reported are principally referred to in this opinion.)*

*Tompkins Special Term, March 1852.* The plaintiff in her complaint set forth nineteen different claims against the defendant, for which she demanded judgment for \$3000 besides costs. After issue joined the cause was referred and tried before a referee; a part of each of four days was consumed in the trial, but the whole time actually spent would not exceed two days if the same number of hours in each day had been devoted to the trial that is usually devoted to the trial of causes at the circuit. The referee reported that the sum of \$1161.02 was due from the defendant to the plaintiff, upon which the plaintiff asks a *per centage*. The litigation so far as it related to one claim of \$800, constituting a part of the amount reported due, rested solely upon

the testimony of two witnesses introduced by the plaintiff, whose testimony the defendant did not seek to contradict or explain; and in relation to two other claims, one of \$118.67, and another of \$10.58, no evidence was introduced except on the part of the plaintiff; after hearing which the defendant's counsel conceded these two items to be legal demands against the defendant. The residue of the time was consumed in litigating some eleven different claims made by the plaintiff against the defendant, amounting in all to about \$500, the greatest number of which, amounting to about \$350, were disallowed by the referee. The entire defence was shown to have been interposed in good faith.

GORDON & EDGERTON, *for the Motion.*

A. & R. PARKER, *Contra.*

H. GRAY, Justice.—I am referred to the cases of Dykman agt. McDonald (5 *How. Pr. R.* 121) and Niver agt. Rossman (*id.* 153) as authority for granting this motion. The decisions of these cases, it seems to me, could only have been warranted by the passage of the law as it was originally introduced; then the court in its discretion might have allowed a per centage upon the amount of the recovery in any case where a trial was had. The amendment to this proposition adopted by the legislature, very clearly shows that it was their intention to discriminate between litigated cases and limit the allowance to those only that are comparatively difficult or extraordinary and so the statute has been construed since the decision of the cases referred to (Fox agt. Gould, 5 *How. Pr. R.* 278; Dexter agt. Gardner, *id.* 440), and even this discretion as is intimated in Hall agt. Prentice, (3 *How. Pr. R.* 128); Sacket agt. Ball, (4 *id.* 71,) and Gould agt. Chapin, is of doubtful expediency, no uniform rule can be arrived at. Justices of the same district have in similar cases, differed not only upon the question of allowance, but upon its amount, and in different districts different opinions exist, in relation to what are difficult or extraordinary cases, and the disparity in the amount allowed, alone renders the administration of justice in this respect inharmonious.

There is no pretence that in the case under consideration any difficult question arose upon the trial, or that there was any thing

to distinguish it from an ordinary litigation, except the time consumed in its trial. If the controversy had been limited to three items of the plaintiff's demand, constituting \$929.25 of the amount embraced in the report, the trial would not have assumed the character of being extraordinary even for its length. It was not the intention of the law, giving to the court a discretion to allow a per centage by way of indemnity against the expenses of an extraordinary trial, that it should be given upon a large and easily established claim, where the trial has been rendered extraordinary solely by the time consumed in litigating the right to recover smaller ones in no way connected with or arising out of it. If the trial was of extraordinary length it was made so by causes for which the defendant was not alone responsible, it was by common consent dilatory, and for that reason consumed much more time than was necessary. Several claims put forth by the plaintiff were rejected by the referee; the time wasted in litigating these unfounded claims also added to the length of the trial. For the successful resistance of them the law affords the defendant no indemnity for the expenses incident to their litigation. If, therefore, the time actually devoted to the trial of the cause would entitle it to be regarded as an extraordinary trial, the plaintiff contributed essentially to make it so, by an effort to establish unjust demands against the defendant, and hence ought not to be allowed a per centage upon the amount recovered. The motion must be denied.



## SUPREME COURT.

MALCOLM AND GAUL agt. MILLER AND MILLER.

Where the plaintiff, in his complaint, claims that one of the defendants purchased a bill of goods of him with intent to cheat and defraud him, and afterwards sold the goods to the other defendant, the latter charged with knowledge of the fraud, and claims the amount of the goods, and that the defendants are insolvent, *held*, that it is a case which comes directly under the operation of the *first* clause of § 219 of the Code, for a temporary injunction to restrain the sale or disposition of the goods by the defendants during the litigation.

It appears by the *complaint* that the plaintiff is entitled to the *relief demanded*, and that it consists in restraining the defendants from a disposition of the goods, which, if permitted, would be an *injury* to plaintiff.

The *latter* clause of § 219 is applicable, where, *during the pendency* of the action, it shall appear by affidavit that the defendant threatens, or is about to remove or dispose of his property, &c., a temporary injunction may issue (*See Perkins & Brown agt. Warren, ante* 341).

The first clause does not provide for a case arising *after* action commenced; and the second clause does not provide for a case arising *before* action commenced.

On motion to dissolve the injunction upon complaint, answer, reply and affidavits, the whole may be examined to ascertain the necessary facts, although there is a denial on oath, in the answer, of the facts alleged in the complaint.

*At Chambers, March 1852. Motion to dissolve injunction.*

The substance of the complaint is, that Peter P. Miller made a fraudulent purchase of merchandise of the value of seven hundred dollars, from the plaintiffs in October 1851, in the city of New York, with intent to cheat and defraud the plaintiffs of the same, and that he soon after sold the said merchandise, with others, without consideration, to the other defendant, with intent to avoid the payment of his debt to plaintiffs, and to cheat his creditors; and that Walter Miller at the time of said purchase from Peter, knew that the latter had obtained the goods by fraud, and that he purchased of Peter with intent to aid in the fraud and that the goods were still Peter's, &c. That Walter removed the said goods to Binghamton, and is about to sell and dispose of them to others. The complaint asks for judgment for the amount of the debt against Peter, and an injunction against both defendants to stop the sale of the goods until judgment and execution

and satisfaction of the same; and alleges that defendants are insolvent, and that the judgment will be unavailing unless the sale of the goods is enjoined.

An injunction was granted at the commencement of the suit, and was served with the summons and complaint on both defendants.

They now move to dissolve the injunction for several reasons, viz., that the facts set forth, if true, do not entitle the plaintiff to this process; and also, that the facts are fully denied in the answer, and that the answer sets up that the goods were purchased on credit, which had not expired at the time this suit was commenced.

B. G. FERRIS, *for Motion.*

A. DANA, *Opposed.*

SHANKLAND, Justice.—On comparing the complaint, answers, reply and affidavits, I have come to the conclusion that the evidence is sufficient to sustain this injunction, provided the facts set forth in the complaint, if true, will entitle the plaintiffs to that process.

If the plaintiffs can sustain their claim to this provisional remedy it must be, by the provisions of the 219th section of the present Code; for it was previously a well settled rule in equity jurisprudence, that a creditor at large, or before judgment, was not entitled to the interference of the court by injunction, to prevent the debtor from disposing of his property in fraud of such creditor (2 *John. Ch. R.* 144).

In the case at bar, the creditors, instead of rescinding the sale to Peter, and reclaiming the goods sold, have affirmed it, and now ask judgment for the amount of the debt. They are therefore, creditors at large, suing for their debt, and under the old equity rule, would not be entitled to an injunction.

But it was the intention of the Code to extend the remedy, by injunction, to just such cases as this. The 219th section of the Code, after providing for other cases, enacts that, “where during the pendency of an action it shall appear by affidavit, that the defendant threatens, or is about to remove or dispose of his property with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition.”

It is contended, on behalf of the motion that the preceding clauses of this section, do not provide for an injunction in a case like this, and that the last clause does not, because it relates to acts or threats made, *during* the pendency of the action only, and not to acts done, or threats made prior to the action being commenced; and that it must be made to appear, by *affidavit*, and not in the complaint, as in this case it does. In support of this view of the section, the counsel cites 4 *How, Pr. R.* 31, and 5 *id.* 437. The Code of 1848, under which the first decision was made, does not contain the last clause of the present section; and besides, the court merely *suggests a doubt*, whether the last clause of the 192d section of the Code of 1848 did not make it necessary that the cause for the injunction should arise *during litigation*. So in the other case cited, although it arose under the Code of 1849, the 219th section of which is *verbatim* like the present one, the learned justice did not find it necessary to decide this question definitively, but merely intimates, an opinion similar to the one in the previous case.

I am of opinion the first clause of that section covers this case, and warrants the process.

It would be an act of the grossest ignorance on the part of the legislature, if, while providing for an injunction to stay an act, committed or threatened *during the litigation*, they should wholly omit a like remedy for a like act, or threat, made *prior* to the litigation. A just and liberal construction of the 219th section will involve them in no such folly. The first clause of that section and the last clause should be taken together in their construction. The first clause is *general*, and reaches all cases, "where it shall appear by the *complaint* that the plaintiff is entitled to the *relief demanded*, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation would produce *injury to the plaintiff*." The last clause is *specific*, and is confined to the particular case of a threatened removal or disposition of property with intent to defraud creditors, *during litigation*.

It will be seen that without both clauses, but one half of the evil would be provided against. The former does not provide for a

case arising after action commenced, and the latter does not provide for a case arising before action commenced. The complaint in this cause, if true, entitles the plaintiff to the relief demanded, and a part of that relief is to restrain the defendants from selling the property fraudulently transferred from one defendant to the other, so that the plaintiffs can not reach it on the execution when obtained against Peter P. Miller one of the defendants. The injury likely to be produced by the acts threatened is, the loss of the plaintiffs' debt. If the plaintiffs establish their case on the trial, their judgment will be for the amount of their debt against Peter, and perpetual injunction against both, prohibiting the sale or other disposition of the goods, or so much of them as is necessary to satisfy the plaintiffs' debt.

This construction of the 219th section of the Code does not war with the intimation of opinion given by Mr. Justice HAND, as to the true construction of the last clause of that section; and I am inclined to concur with him in that construction, as it will make the whole section orderly, consistent and complete, and thereby give a remedy for cases arising as well *after* as before suit commenced.

If the sale from Peter to Walter, was fraudulent, then, so far as creditors are concerned, the goods remain the property of Peter, and the threats and doings of Walter, in pursuance of the common object of fraud in both, are the threats and doings of Peter and brings the case within the remedy intended by that section, as more clearly developed by the last clause, which is a specific remedy given in specific words, for causes arising after suit, but which same remedy is given in more general words in the first clause, for the same causes arising before suit instituted.

The defendants admit in their answer, that a part of the debt was due at the time of the commencement of this suit. This dispenses with the necessity of here determining whether the plaintiffs can avail themselves of the fraud so as to avoid the time of credit given on such sale, and yet affirm the contract, so far as to sue for the money, before the credit expires.

The motion to dissolve the injunction is denied, with ten dollars costs.



## SUPREME COURT.

RICART agt. TOWNSEND, and CLAPP & HOWARD, Administrators  
of CLAPP.

Under the Code, it is no misjoinder of parties, to unite the surviving partner with the representatives of the deceased partner, in an action on a contract made by the copartnership, when in existence. (*It was otherwise under the former system of pleading and practice.*)

The prayer of the complaint in such action, should clearly define the grounds of relief against each party.

*New York Special Term, April 1852.* This was an action on a contract made by the firm of Clapp & Townsend, which consisted of Ruell Clapp, deceased, and the defendant Townsend. The suit was brought against the surviving partner and the representatives of the deceased partner, for a breach of the contract, and the prayer of the complaint was for "damages against the defendants, \$15,000, besides costs," &c.

The defendant demurred on the ground of a misjoinder of parties, insisting that the action could be brought only against the surviving partner.

H. DRESSER, *for Defendants.*

C. A. BURLING, *for Plaintiff.*

EDMONDS, Justice.—Under the old practice, the creditor of a partnership situated as this is, could not have all the remedy to which he might be entitled, without resorting both to proceedings at law and in equity.

To reach the individual liability of the surviving partner, the resort was to an action at law, as it was, to reach the partnership property which vested in the surviving partner, and could be reached only through him.

To reach the liability of the deceased partner resort must be had to an action in equity, against his representatives, in which the surviving partner might be made a party, because he was interested to keep down the amount of debts, but no decree could be had against him, because the remedy against him was at law.

This circuitry of action and multiplication of remedies grew up gradually and of necessity, to remedy defects in the administration of justice in the courts of law arising from their rules of practice, but there was no good reason for upholding it a moment longer than such necessity existed.

The first step towards removing that necessity was in the union of the law and equity jurisdiction in the same court by the constitution, and the next was in the remodeling of the practice by the Code.

Section 118 of the Code allows any person to be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein, and under it, when a misjoinder of parties is objected, the inquiry must necessarily be, has the party an interest in the controversy adverse to the plaintiff? or does he claim such an interest? or is he a necessary party to a complete determination of the questions, whatever they are, which are involved in the controversy? If either of these questions are answered in the affirmative, the person is properly made a party. And the question raised by this demurrer must be tested in this manner, and being so tested, it becomes at once evident that there is no misjoinder of parties.

If the action is brought to reach the partnership property, the surviving partner is a necessary party, and the representatives of the deceased partner are properly made parties, because they have an interest in the controversy.

If it is brought to reach the individual liability of the deceased partner, the surviving partner is a proper party, because he is interested to keep down the debts, and might be liable to contribute to the estate of his former partner his share of the debt.

If it is brought to enforce the liability both of the partnership property, and of the partners individually, then the surviving partner, and the representatives of the deceased, are necessary parties, and under § 122 of the Code, it would seem that the respective rights and liabilities of all the parties may be determined in this action.

Be that, however, as it may, I see no objection to the joinder of all these parties in this suit, and I see no difficulty in the way

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Eno agt. Crooke.

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of the courts rendering therein the same judgment that would have been rendered in the two suits, one at law and the other in equity, which were necessary under the old practice.

It may, perhaps, be necessary for the plaintiff to amend the prayer of his complaint, so as to specify more particularly what is the relief which he seeks against each party; as to the surviving partner, whether he aims at reaching the partnership property through him as survivor, or merely makes him a party in his effort at reaching the individual liability of the deceased partner; and as to the representatives of that partner, whether the object is to enforce his individual liability, by and through his estate in their hands, or whether they are merely made parties in the effort to reach the partnership property.

In these respects it may be necessary to make the prayer for relief more definite, as at present it is very general, and might involve a personal liability of the representative.

Yet even if in this respect the complaint is imperfect, that is not an error that is available on this demurrer. The proper remedy is by motion to make the complaint more definite.

The ground taken by the demurrer is the misjoinder of the surviving partner with the representatives of the deceased partner, and I have already said that is not well taken.

The demurrer must be overruled, with costs.

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## SUPREME COURT.

ENO agt. CROOKE.

Where a judgment entered at special term, is appealed to the general term, and is there affirmed; a *new judgment* should *not* be entered. The simple judgment of affirmance, with the award of costs (if any) should be attached to the original judgment roll. It is improper to enter up two judgments in the *same court*, for the same demand.

*It seems*, that the old practice of entering a new judgment upon an appeal, will still apply, where the appeal is brought from a judgment of an *inferior court* to the Supreme Court.

*Dutchess Special Term, March 1852. Motion to set aside judgment of affirmance.* On the 20th June 1852, judgment

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Eno agt. Crooke.

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was entered for the plaintiff on the direction of a single judge, for \$2324.20. The defendant appealed to the general term, but without obtaining a stay of proceedings. The judgment was affirmed at the general term in January 1852. The plaintiff thereupon entered up judgment for \$2469.95, being the amount of the original judgment and of the costs of the appeal, including \$94.90 interest on the original judgment, allowed as part of the costs. The defendant now moves to set aside or reduce the amount of the last judgment.

WM. ENO, *in Person*.

JAS. L. CAMPBELL, *for Defendant*.

BARCULO, Justice.—Under the old system when a judgment brought into this court from an inferior court, by writ of error, was affirmed, a new judgment was entered in this court embracing the former as well as the costs and damages awarded on the writ of error. But that practice was founded upon the theory that the cause was taken from the court below, and remained thereafter in the Supreme Court. Hence execution was issued from the latter court, and other proceedings supplementary, were based upon the last judgment. That practice is perhaps still applicable to appeals from inferior courts to the Supreme Court; and has probably misled the plaintiff in this case.

But the reason of the rule does not apply to appeals from a judgment entered on the direction of a single judge, to the general term. For here both judgments are in the same court; and there is an obvious impropriety in entering up two judgments in the same court for the same demand. On affirming such a judgment at the general term the court does not direct a new judgment to be entered for the original claim; but it simply declares that it is satisfied to let the former judgment stand and therefore simply *affirms* it. This is all that the entry of judgment should contain, unless costs are awarded, in which case it should adjudge the costs as adjusted to the prevailing party.

In the present case the plaintiff has proceeded as if he supposed the former judgment was vacated. He has, therefore, entered up a new judgment, composed of the amount of the first, increased by the interest and costs of appeal. But the first judg-



ment is not vacated; and it would be highly prejudicial to plaintiffs' in many cases, if a judgment was vacated by an appeal; as it would destroy the lien, which had been obtained. The judgment on appeal should have merely stated, after reciting the appeal, *that the decision of the court thereupon had been filed, whereby the said judgment was in all things affirmed*; and that the court adjudged that the plaintiff recover of the defendant fifty dollars and eighty-five cents for his costs and disbursements upon the said appeal. Mr. MONELL has correctly stated the practice in his treatise (*Monell's Pr.* 286, and forms No. 106 and 107).

The execution will follow the judgment and direct the collection of the original judgment out of the lands, &c. belonging to the defendant when it was docketed, and may also direct the collection of *the amount of costs awarded on the appeal*, or a separate execution may be issued therefor.

I am apprehensive that considerable irregularity prevails in entering judgments in some of the clerks' offices. From a cursory examination of the books in one of the offices in relation to this case, I found the judgments on appeal frequently entered as this was. In one instance I found *three* judgments for the same sum; one rendered at the special term, one at the general term, and one, on affirmance by the Court of Appeals. Thus, for a claim of about two thousand dollars, judgments are entered up for six thousand with the accumulation of costs and interest. Now, suppose the plaintiff wishes to reach the defendant's lands lying in a distant county, upon which of the judgments would he issue execution? If he issued it upon the last he must abandon the lien acquired by the first; and, if he proceeds upon the first, he does not obtain the costs of the two appeals: and, if upon all three, then he collects nearly three times as much as he is entitled to. If, however, the second judgment had merely awarded the costs of the appeal to the general term, and the third, the costs in the Court of Appeals, the three judgments would express the true aggregate amount and could all be plainly included in one execution.

The only plausible objection which has been presented to my mind to this view of the practice arises out of the forms prescribed for appealing to the Court of Appeals. It is urged that

if the judgment of affirmance merely awards the costs, an appeal from that judgment to the court of last resort, will not remove the original judgment, nor will the security given stay proceedings thereon. It must be admitted that the provisions of the Code, in this respect, as well as many others, might have been more explicit and intelligent; but still, I think, there is no real difficulty in obtaining the benefits of an appeal. The judgment of affirmance is, or should be, attached to the original judgment roll; so that an appeal from the former, must carry up the whole case, and security can be given to cover the whole judgment, and a stay of execution be obtained. At all events the difficulty, if any, is as great where the judgment of affirmance is entered in the form adopted by the plaintiff in this case, as it is where there is a simple affirmance; for in either case the first judgment stands open upon the record. The idea that an appeal vacates the former judgment has no foundation in any principle applicable to the subject; and is inconsistent with section 282, which provides for a suspension of the lien of a judgment during the pendency of an appeal.

The judgment entered in this case, on affirmance, must be set aside, with leave to the plaintiff to enter up a judgment in accordance with the foregoing views. Neither party is to have costs of this motion

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## SUPERIOR COURT.

DEWEY agt. STEWART AND BLAKENEY.

### COSTS.

Where the plaintiff on the trial withdraws a juror, and is allowed to amend his complaint, on payment of the defendant's costs of the term.

The defendant is allowed \$12 for trial fee, and \$7 for services subsequent to notice of trial and before trial. (*This agrees with Mitchell agt. Westervelt, ante p. 265.*)

June, 1852. In this case the plaintiff brought on his cause at the trial term, and on a motion for a non suit was permitted to

withdraw a juror and move to amend his complaint on payment of the defendants' costs of the term.

In making up their costs of the term, the defendants claimed seven dollars for their costs subsequent to the notice of trial and before trial, and twelve dollars for the trial. The clerk disallowed the former, and for the latter allowed ten dollars only, as the fee for a term at which the cause is on the calendar and is postponed. The defendants moved to correct the clerk's adjustment of the costs.

J. O. ROBINSON, *for the Defendants.*

T. G. TALCOTT, *for the Plaintiff.*

SANDFORD, Justice—(*with the concurrence of all the Justices*). As to the trial fee, it ought to be adjusted at twelve dollars. There was a trial, and the plaintiff virtually failed in his suit. As a favor, he was relieved on terms, instead of having his complaint dismissed.

The fee of seven dollars is provided as a compensation for the attorney's services intermediate the notice of trial and the trial, such as the subpœnas and tickets, their service and procuring the attendance of witnesses, as well as the brief for counsel, and on the part of the plaintiff, the copy of the pleadings for the court. The latter, it is true, will answer for the trial whenever it occurs, and so in general will the brief. Before the Code, it was settled (6 *Hill*, 553) that the copy of pleadings could not be taxed as costs of the circuit, overruling the practice that had long prevailed, by which it had been allowed (4 *Cow.* 539; 1 *Cow. & Hill's Notes to Phill. Ev.* 54, 55).

In fact, all these services are rendered in preparation for the term at which the cause is noticed, and those in respect of witnesses must necessarily be rendered anew if the cause be postponed. We therefore fully agree with Mr. Justice HAND, of the Supreme Court (Mitchell agt. Westervelt, 6 *How. Pr. R.* 265), that the seven dollars provided by the Code is a part of the costs of the trial, term or circuit, and must be paid as such by the party who obtains a postponement of the trial on the payment of costs, or is subjected to the payment of the costs of the term or circuit for any cause.

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The same point has also received the sanction in the Supreme Court of Justices WILLARD and PARKER (4 *How. Pr. R.* 304; 5 *id.* 336).

If because the cause is put off on terms at a trial term, when from its position on the calendar it is not likely to be reached, and therefore it is probable no preparation for the trial has actually been made, the court can readily obviate the effect of the practice we have adopted, by specifying in the rule the amount of costs to be paid.

The adjustment of the clerk must be corrected accordingly.

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## SUPREME COURT.

### THE ROCHESTER AND SYRACUSE RAIL ROAD COMPANY Respondents agt. BUDLONG Appellant.

Upon the appraisal to fix the compensation for land taken by a Rail Road Company for their road, by commissioners appointed by the court, the rules of law are to govern in the admission and rejection of evidence.

In determining the compensation to be made to the party whose lands are taken, the commissioners are to exercise their own judgment formed upon their view of the premises, in connexion with the testimony of the witnesses before them, and not to the exclusion of it.

Opinions of witnesses qualified to form a proper judgment of the value of the land from which the road is taken as a whole, and how its value will be affected by severing the portion proposed to be taken for the purposes of the corporation, are competent as evidence.

Opinions of witnesses as to how much *damage* or *injury* the party whose lands are taken will sustain, otherwise than by diminishing the value of his property, are incompetent.

Compensation is, making the party a full equivalent in money for the loss he sustains by the appropriation of his property, and includes not only the value of that taken, but the diminution in the value of that from which it is severed also.

Where evidence has been rejected which the party was entitled to give and have considered by the commissioners, and which, had it been received, might have led to a more favorable determination for him, the report and appraisal will be set aside. The presumption is that the testimony, had it been received and considered, would have had its proper weight.



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The court will not interfere and set aside the appraisal, on the ground that the compensation awarded is too great or too small, unless the evidence of injustice is palpable on the face of the proceedings as contained in the report.

*Seventh Judicial District General Term, December 1851. Present, WELLES, SELDEN and JOHNSON, Justices.* This was an appeal from the appraisal and report of the commissioners appointed to ascertain and appraise the compensation to be made to the appellant for his land proposed to be taken by the Rail Road Company, to the general term of the Supreme Court.

The facts will sufficiently appear in the opinion.

T. & O. HASTINGS, *for Appellant.*

T. R. STRONG, *for Respondents.*

By the Court, JOHNSON, Justice.—On the hearing before the commissioners, as appears by their report of the proceedings and evidence now before us, the appellant offered, amongst other things, to prove by competent witnesses how much, in their opinion, his property would be diminished in value by taking from it the piece of land proposed to be taken by the company; taking the situation of the fields, the facilities of water for farming purposes, and the construction of the road as the company proposed to build it, into the account. He also offered to prove by the opinions of witnesses what damages he would sustain by the taking of the land and the construction of the road, in carrying on his farm as he had been accustomed before to use it for the purposes of cultivation and grazing. The commissioners overruled all questions of the latter and several of the former character as incompetent.

In the case of *McBurney and Bacon agt. The New York and Erie Rail Road Co.* the Supreme Court in this district at the general term in December 1850, held that it was the right of the land owner whose compensation was the subject of appraisal and determination, to produce before the commissioners, and the duty of the commissioners to hear any and all evidence which would be competent by the rules of evidence upon trials in courts of law upon similar questions. And we also held in that case that it was the duty of the commissioners, after viewing the premises and hearing the evidence, to decide from the evidence furnished

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by their view as well as from the testimony of the witnesses before them. That they were to exercise their own judgments, founded upon the view in connexion with the other evidence, and not to the exclusion of it.

And we further held in the same case, that opinions of witnesses competent to judge, as to the value of the farm, as land were usually valued and sold in the neighborhood, as a whole, and its relative value after the quantity surveyed and proposed to be taken, should be taken for the use of the company, were proper as evidence, and we ordered a new appraisal for the rejection of such evidence.

It is exceeding difficult to lay down any general rule of evidence by which damages are to be ascertained which will furnish a just and proper standard for every case. The boundary between judgment founded upon knowledge of facts, and that which is based upon speculation and hypothesis merely, is often confused and somewhat difficult to trace. But the opinions of witnesses competent to form a proper judgment in regard to the value of the property for the purposes of selling, or renting, or hiring, and how that value would be affected by the injury complained of, has always been regarded as pertinent evidence. The same rule prevails in regard to real and personal property, although real estate can scarcely be said to have any market value, strictly speaking. It has, however, a known and appreciable value quite as definite and certain and as well understood by those acquainted with real estate in the vicinity, as any commodity vendible in market. The object of an appraisal is to make the owner of the land taken, good, by rendering an equivalent in money for the loss he sustains in the value of his property, by being deprived of a portion of it. This, it is obvious must be the main ingredient in the compensation which the commissioners are to determine. Compensation includes not only the value of the portion taken, but the diminution of the value of that from which it is severed also. And this may always be proved by the opinions of competent witnesses.

On the other hand, the opinions of witnesses, however well informed as to how much a party seeking redress will be injured or damnified in other respects, independent of this diminution of

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value, have been pretty uniformly rejected. In such cases it is obvious that opinions would be merely matter of speculation, upon which no two would be likely to agree, having no common and universally recognized standard to appeal to.

In all such cases, the facts and circumstances must be laid before the tribunal called upon to determine, and they must draw the inference.

In this view of the proper mode of proceeding, the appellant has been deprived of some evidence that he was fairly entitled to, while much that was offered was very properly rejected.

In cases of this kind, where the persons who are to pass upon the question of compensation are authorized to exercise their own judgment, formed after a deliberate examination of the subject of appraisal personally, and are therefore qualified to correct any exaggerated estimate testified to by witnesses; it can not be necessary to go beyond the rules of law in excluding evidence, or even to insist upon the most exact and rigid strictness. Though the general rules of evidence, fairly interpreted, should undoubtedly be adhered to in the admission and rejection of testimony offered.

We do not undertake to pass upon the amount of compensation awarded by the commissioners, whether it is too great or too small. Nor should we feel at liberty to interfere with the report upon that ground, unless the evidence of injustice was palpable upon its face. It is sufficient that the appellant was deprived of evidence that he was entitled to have considered, the judgment of intelligent and competent witnesses, to call upon the court to set the appraisal aside. Whether the evidence offered and rejected improperly, would have influenced the decision had it been received and weighed, it is not necessary to decide. We are to presume, however, that it would have received its proper attention, and had its due weight in the decision.

It is enough that the appellant was entitled to it, and that it might, had it been received and considered, led to a more favorable determination in his favor. The report and appraisal must, therefore, be set aside, and a new appraisal ordered before new commissioners.

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Erickson agt. Compton.

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## SUPREME COURT.

ERICKSON agt. COMPTON.

A principal may, under sections 111 and 113 of the Code, sue in his own name upon a simple contract in writing made with his agent, and in the agent's name, of which the principal is the sole owner.

(*The rule was otherwise in this state before the Code.*)

*Cayuga General Term, June 1852. Before Justices SELDEN, JOHNSON and T. R. STRONG.* This was an action upon a contract, a copy of which is hereinafter given. The plaintiff alleged in his complaint that he, by James H. Hotchkin jr., his agent, entered into a contract with the defendant, setting forth the substance of it in like manner as if it had been made with himself in person, and assigning several breaches. The defendant in his answer denied that he made a contract with the plaintiff in person, or by his agent, but stated that he made a contract with James H. Hotchkin jr., of which duplicates were made; one of which, signed by Hotchkin, was delivered to the defendant; and the other, signed by the defendant, was delivered to Hotchkin, and that Hotchkin at the time delivered to the defendant his check on the Steuben County Bank for the \$500 mentioned in the contract. A copy of the contract retained by the defendant was set out in the answer as follows:

“Rec’d of James H. Hotchkin jr. his check for \$500, on Steuben County Bank, payable on Monday next, to be applied on the last invoice of the following contract, viz: I agree to sell him all the pulled wool I now have on hand here and in New York, that is unsold, and what is on the skins I have now bought up to this time; also to include all the green skins which may come in or be taken off by me up to the first day of June next, except qualities below No. 2, and to get up the wool in dry order, and in order, as to condition and quality, equal to what I now have on hand here, and making the wool now in the hands of B. Marshman, 39 Spruce street, New York, the sample of its condition, all to be taken off by the first day of June next, and to keep pulling on this contract until all is pulled; and the amount, not exceeding 60,000 lbs., and deliver the same to J. Fowler’s



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landing on Seneca Lake at  $26\frac{1}{2}$  cents per lb.; said Hotchkin to furnish the sacks and pay for the wool on each invoice, to average every fifteen days, at my counting room, Tyrone; the sacks to be their actual tare; sacks to be good and delivered in time, else Compton to furnish them at 5s. each.

Tyrone, 30th January 1849.

J. H. HOTCHKIN JR."

The defendant alleged that he made the contract with Hotchkin as principal and not as agent; that it was made for the benefit of Hotchkin, and that the plaintiff had no interest in the same. He also answered as to the breaches assigned.

The plaintiff replied that the contract set forth in the complaint, and also set forth and referred to in the answer, was made with the defendant by Hotchkin as the agent of and for the plaintiff, of which the defendant then had notice; that the money advanced by Hotchkin was the money of the plaintiff; and that the plaintiff was the sole and only party interested in the contract as purchaser. Issue was taken upon other matters in the answer.

The cause was brought to trial at a Circuit Court in Steuben county in November 1850, when the duplicate contract, signed by the defendant, was produced and proved by Hotchkin, and read in evidence.

The plaintiff's counsel then proposed to the witness, "In what capacity were you acting at the time of the execution of the contract?" This question was objected to by the defendant's counsel and the objection was sustained by the court and the question excluded. To this decision the counsel for the plaintiff excepted.

The plaintiff's counsel then offered to prove that at the time the contract was made the witness was acting as the agent of the plaintiff; that the witness had no interest in the contract, or the subject matter of it; but that it belonged solely and exclusively to the plaintiff who had furnished the five hundred dollars advanced at the time of the execution of the contract; and that the defendant before and at the time the contract was executed knew these facts. The defendant's counsel objected to this evidence and the court decided that the testimony was inadmissible and excluded it. To this decision the counsel for the plaintiff excepted.

The plaintiff having no further evidence to offer, the court directed a non suit.

Judgment having been entered against the plaintiff, he appealed to the general term.

O. H. PALMER, *for Plaintiff*.

D. G. SUNDERLIN, *for Defendant*.

By the Court, T. R. STRONG, Justice.—It appears to be a well established rule in England that a principal whose agent has entered into a simple contract in writing in the business of the agency in the agent's name, whether the agency was or was not disclosed at the time, may prove by parol the fact of such agency and maintain an action on the contract in his own name. Such proof it is there held does not contradict the contract; "it merely lets in a third party who was really interested." The cases in support of this doctrine are collected in *Story on Agency*, § 160, 163, 269, 270, and notes (see also *Humble vs. Hunter*, 12 *Adolphus & Ellis*, 310; *Schmalz vs. Avery*, 3 *Eng. Law and Eq. Rep.* 391, 395). Indeed the English rule goes further and holds the principal bound by and liable upon such a contract in like manner as if he had signed it (*same cases*). I am inclined to think, however, that the common law rule on the subject in this state is the other way; it certainly is as respects the liability of the principal on the contract (*Newcomb vs. Clark*, 1 *Denio*, 226, 229; *Harp vs. Osgood*, 2 *Hill*, 216, 219; *Minard vs. Mead*, 7 *Wend.* 68; *Pentz vs. Stanton*, 10 *Wend.* 271; *Spencer vs. Field*, *id.* 87; *Allen vs. Coit*, 6 *Hill*, 318; *Evans vs. Wells*, 22 *Wend.* 324; *Townsend vs. Hubbard*, 4 *Hill*, 351; *Moss vs. Livingston*, 4 *Comst.* 208). Hence, if the question in the present case as to the admissibility of the evidence offered at the circuit was to be decided upon common law principles, I should feel bound by the authorities to sustain the decision excluding it.

But I am satisfied that, under the provisions of the Code, the evidence offered in this case was admissible; and that assuming to be true, what was proposed to be proved, the action was well brought in the name of the plaintiff. Section 111, of the Code, provides that "every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section

113, &c. By section 113, "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another." It was not necessary for the plaintiff, as it would have been before the Code to show that the contract was made with him, to entitle him to sue upon it, but it would have been sufficient to prove that he was the sole owner of the contract by its having been made for his benefit. The difficulty in such a case at common law was well stated by JEWITT, Justice, *Newell vs. Clark*, before cited. That was an action by the principal on a written guaranty made to his agent. He says: "The rule in regard to parties to actions seems to be, that every action on an express contract must be brought in the name of the person to whom the engagement violated was originally made, unless it is transferable as a negotiable note, &c. In the present case the promise or agreement is expressly made with Peters; Clark's name does not appear in the writing. It was not competent to contradict or amend the agreement, by parol proof, by substituting Clark's name as the promisee in place of Peters." According to this doctrine an action would not lie in the name of the principal, unless he was an original party to the agreement. The English cases hold that he might be proved to have been such by parol, but the cases in this state appear to decide that the contract could not be thus amended by adding a party. The Code, by the sections named, has abolished the common law rule in regard to parties, in such a case, so far as it was imperative, and conferred upon the exclusive owner of the demand the right to sue in his own name or in the name of the agent, at his election. That rule being abolished the plaintiff was not required, in order to maintain the present action, to amend the agreement in question by substituting or adding the plaintiff's name. The agreement need not have been made by, or with him, as an original party. It might be treated as having been made with Hotchkin. If the plaintiff had the entire title to the claim, it was all that was important. Nor would the parol proof offered

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have contradicted the contract, regarding it as made with Hotchkin. It would, on the contrary, have been in perfect harmony with it. There is no inconsistency between a contract in the name of one person, and the fact that another person is entitled to the benefit of it. It will thus be seen, I think, that the obstacle which existed at common law to the plaintiff's bringing the action and making the proof offered in this case, has been entirely removed.

In the view of the case now taken, it would have been more proper for the plaintiff to have set forth the contract in his complaint, as made with Hotchkin, and alleged that it was made by him as agent of the plaintiff, and for the plaintiff's benefit; and I should entertain doubts as to the right of the plaintiff to recover upon the complaint as framed, but for the fact that the defendant has himself set out the contract fully in his answer, and the plaintiff has adopted it in his reply as the one referred to in the complaint. This, I think, obviates the objection now suggested.

It follows that the evidence which was rejected should have been received. A new trial is therefore granted, costs to abide the event.

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## SUPERIOR COURT.

HARLOW agt. HAMILTON AND WIFE AND MOORE.

The 160th section of the Code, providing for striking out irrelevant and redundant matter, was not intended as a substitute for a demurrer.

Irrelevant or redundant matter may be contained in a pleading which contains a good cause of action or defence.

Mere matter of evidence is never to be pleaded.

The allegations in a pleading which are to be taken as true, if not controverted by the other party, are *material* allegations.

Nothing is admitted, by an omission to answer it, but what is well pleaded.

When a pleading is palpably frivolous, the proper course is to demur or to move for judgment under § 247, or to move to strike it out under § 152.

In *gross* cases of frivolous pleading, the party may treat it as a nullity.

(*This agrees substantially with the case of Nichols agt. Jones, ante 355, upon the same points decided in that case.*)



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Harlow agt. Hamilton and wife and Moore.

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*Saratoga Special Term, December 1851.* This action was commenced in October last by summons and complaint. The plaintiff claims to be the owner of two judgments against Alfred Hamilton, recovered in 1851, on which execution against the real and personal property of the said Alfred had been returned by the sheriff of Saratoga county, *nulla bona*, &c. It alleges that before these judgments were obtained, Alfred Hamilton in 1850, with a view of placing his property beyond the reach of his creditors, conveyed it all to the defendant Moore, who immediately thereafter conveyed it to Ann Maria, the wife of defendant, Alfred Hamilton. These conveyances are alleged to have been made without consideration, and the relief demanded by the complaint is to have those conveyances declared fraudulent and void as against the plaintiff's judgments, and to have the said judgments satisfied out of said property.

The answer of the defendant Ann Maria denies all knowledge sufficient to form a belief, that the said Alfred "signed or swore to a confession of judgment in favor of the plaintiff," or that the judgment had been entered thereon as mentioned in the complaint.

She then alleges that the note on which the judgment was obtained was without consideration; that it was given and the judgment confessed when he was drunk and unable to transact business, and that the note was transferred to the plaintiff before it became due.

She denies that the said Alfred was ever indebted to the plaintiff on the note, and the consideration thereof was a liquor and tavern bill against said Alfred, which he was not liable to pay, and she denies all knowledge of the execution, sufficient to form a belief thereof.

She then says that for several years previous to April 1850, the said Alfred had been an habitual drunkard, and was incapable of managing his affairs, and had squandered a large portion of his property; that in 1849 he was judicially declared by the county court to be an habitual drunkard, and the defendant Moore was appointed committee of his estate, and continued in the discharge of that duty until April 1850. That then the said Moore being desirous of being discharged from the trust, applied to the

county court for a suspension of the commission, which was granted; and thereupon the said Alfred transferred all his property, real and personal, to the said Moore, and the said Moore to the said Ann Maria, as her sole and separate property, free from her husband's control and interference, and not to be subject to his debts, and to be held and enjoyed by her as if she was a *feme sole*, which arrangement was approved by the county court. She says that she and the said Alfred have five children depending upon them for support, and the sole object of this arrangement was to place the property in a situation not to be subject to the debts of the said Alfred, and appropriate it for the support of the said Ann Maria and the children. That at the time of this arrangement Moore informed her of all the debts against the said Alfred that he knew of, and that neither Moore or the said Ann knew of the debt for which the judgments were obtained, nor of the judgments.

The answer then states that in January 1850, the plaintiff recovered against said Alfred \$1125.44, upon a note given for liquor and tavern expenses, to Rachel Voorman, and another for \$200, and not knowing of any other demands against him, the committee did not contest them, but suffered judgment and finally paid them. The plaintiff held the note on which the confession was given, when this suit was settled, but concealed the fact until after he had got his pay for the other demand.

She also denies that at the time of the arrangement above mentioned, she knew of the other judgment mentioned in the complaint, and asserts that that debt was for liquor. And she says that she gave her husband her written obligation to pay him \$1000 as the consideration for this arrangement, which he still holds. She says the arrangement was in perfect good faith and with no intent to defraud creditors; and that Moore paid all the debts he knew of, &c. It concludes with some other allegations of no importance.

On the part of the plaintiff a motion was made at the last special term to strike out all the above answer, as redundant, except so much as was intended to put in issue the judgments and execution set up in the complaint, and the averment of the defendants' good faith in making the assignment.

A. MEEKER, *for the Motion.*

GEO. G. SCOTT, *Contra.*

WILLARD, Justice.—There can be no doubt that a considerable part of the complaint is irrelevant and redundant matter, and would have been stricken out on a proper motion. It was entirely unnecessary to set out the record of judgment at length. The record is merely evidence. Nothing more was required as a pleading than to set forth the rendition of the judgment, the time when it was recovered, and the amount, with the averment of jurisdiction. But the defendants answered over, and therefore can not raise this objection.

The 160th section of the Code, which provides for striking out irrelevant and redundant matter, was not intended as a substitute for a demurrer. It takes the place of exceptions for impertinence under the old chancery practice. Irrelevant matter would doubtless have been struck out of a declaration, where the pleading had been stuffed unnecessarily with long recitals, records, &c.

The fact that irrelevant matter could not be allowed to the prevailing party on taxation, was in general in courts of law a sufficient check against the abuse. Irrelevant and redundant matter may exist in a pleading which contains a good cause of action or defence. It generally arises from not distinguishing between pleadings and evidence. Pleading is the logical statement of the facts which constitute the cause of action or the defence, with the requisite statement of time and place. It comprehends affirmative as well as negative allegations; the mode of stating which is sufficiently pointed out in the Code (§ 142, 149, 153, &c.) Mere matter of evidence is never to be pleaded. As bills of discovery are abolished, there can be no object in setting up in the complaint collateral facts with a view to obtain an admission of them, or to treat them as admitted, if not denied. The allegations in a pleading, which are to be taken as true for the purpose of the action, if not controverted by the adverse party, are *material* allegations (*Code*, § 168). Matters upon which no material issue could be framed, are not admitted by omitting to notice them. Nothing is admitted but matters well pleaded.

The irrelevant or redundant matter, which the Code authorizes

to be stricken out, is such as implies that the pleading contains other matter which is material. If the *whole* answer is bad, the proper remedy is to demur, or to move under § 152, to strike it out as an irrelevant defence; or if it be palpably frivolous, to move for judgment under section 247, and perhaps, in gross cases, to disregard it altogether, and to take judgment as if no answer was put in. Matter is said to be irrelevant when no material issue can be framed upon it (6 *How. Pr. R.* 68). It is redundant when the pleading expresses the same meaning, after the matter is expunged, as it did before. A motion to strike out a few redundant words is often viewed as captious. One of the greatest abuses in the old chancery practice grew out of frivolous exceptions for impertinence.

The difference between a sham and irrelevant answer or defence is this: a *sham* answer is in general good in form, but untrue in fact (Brown vs. Jennison, 3 *Saund. S. C. R.* 732; *Burrill's L. Dic. title Sham Plea*; Darrow agt. Miller, 5 *How. Pr. R.* 249, per SILL, J.) An *irrelevant* answer may be both good in form, and true in fact, but have no relation to the cause; for example, a bankrupt's discharge to an action of slander. The 152d section of the Code of 1851, provides for striking them out. A demurrer, answer or reply may be *frivolous* within the meaning of § 247, although good in form, if it is so far destitute of any reason to support it as to carry with it presumptive evidence that it was interposed in bad faith, and for delay. Hence the party whose pleading has been adjudged frivolous, will not be entitled as of course to amend, or to substitute another pleading, without at least an affidavit of merits (McMurray agt. Gifford, 5 *How. Pr. R.* 14; Darrow agt. Miller, *id.* 247; Appleby vs. Elkins, 2 *Saund. S. C. R.* 673).

In the present case the plaintiff has mistaken his remedy. The answer is long, and is stuffed with matters of evidence, no part of which forms any defence to the action. The circumstances it discloses are sufficiently colorable to prevent its being treated as a nullity. It may have been interposed in good faith. The facts sought to be stricken out are not, however, *irrelevant* to any defence set up, for there is no valid defence contained in it; and for the same reason it is not *redundant*. There is nothing stated



*over and above* a defence, for there is no defence in it. These terms evidently imply that if the objectionable matter be struck out, something will remain, not *irrelevant* or *redundant*, and which tends to sustain an action or constitute a defence. The present answer can not sustain a defence, unless it can be shown that a debtor can protect his property from an execution creditor by conveying it through the medium of a friend to his wife, in consideration of her obligation to support her own children, provided the parties are governed by parental affection. That is the sole and only point which the answer seeks to establish. It is palpably frivolous; and the motion should have been under § 152 to strike it out as such; or the plaintiff should have demurred, or moved for judgment under § 247.

I shall deny this motion. If it should be granted, the part of the answer remaining would be as far from constituting a defence as the whole together. As there was color for the motion, it must be denied without costs, and without prejudice to any other remedy which the plaintiff may adopt. The time for replying, or demurring, or moving to strike it out, is enlarged twenty days.

Motion to strike out denied. (a)

(a) A motion was afterwards made under § 247, for judgment on account of the frivolousness of the answer, and was granted by the judge. The judge thought that the whole answer taken together, contained an admission of the plaintiff's judgment and execution, and the matters of defence set up, were palpably frivolous.

## SUPREME COURT.

## MASON agt. BROWN.

A motion to change the place of trial on the ground that the proper county is not designated, may be made *before* issue joined, while a motion to change it for the convenience of witnesses can only be made *after* issue joined.

*It seems*, that the alteration of the 126th section of the Code (in 1851) has abolished the distinction between the "*venue*" and the "*place of trial*;" so that now the venue can no longer be in one county and the place of trial in another.

Therefore, it would be an idle ceremony to change the venue to the proper county upon the application of one party, when it is made to appear by the other party that the convenience of witnesses requires that the trial should be had in some other county. (*The case of Moore agt. Gardner*, 5 How. 243, *approved*, as correct as the law then stood, but not necessarily applicable since the change )

The affidavit of an attorney verifying a pleading is good, where the action or defence is founded on a written instrument *in his possession* (Code, § 157). Not necessary in such case, to show that he has personal knowledge of all the material allegations of the pleading.

Where witnesses reside within one mile of the place where it is sought to have the trial take place, they are not to be disregarded in determining the place of trial, because they do not reside in the same county.

*Albany Special Term, January 1852. Motion to change the venue.* The action was brought upon a promissory note. The plaintiff resided in the state of New Hampshire. The defendant resided in the county of Madison. The defendant's attorney, before the time for answering had expired, served on the plaintiff's attorney a demand in writing that the trial be had in the proper county. The venue was laid in the county of Albany. The defendant's answer was served on the 24th of November 1851, by mail. The plaintiff's attorney served on the defendant's attorney a reply which was received by him on the 2d of January 1852. He immediately notified the plaintiff's attorney that he refused to receive it on the ground that the same was not duly verified.

The defendant had answered upon oath. The affidavit of verification subjoined to the reply was made by the plaintiff's attorney. It stated "that the reply is true of the defendant's own know-

ledge, except as to matters stated upon information and belief, and as to those matters he believes it to be true; that the ground of his belief is information derived from Willard Lawrence, the payee of the note mentioned in the complaint, and which he believes to be true; that the action is founded upon a written instrument, which is in the possession of the attorney; that the reason why the affidavit was not made by the plaintiff was that he resided at Nashua in the state of New Hampshire, and was not present to make it."

On the 6th of January the plaintiff's attorney served on the defendant's attorney, notice of a motion for an order directing the trial to be had in the county of Albany, founded upon an affidavit showing that the cause of action arose at Greenbush, within one mile of the city of Albany, where four material witnesses for the plaintiff resided. Subsequently the defendant's attorney served notice of a motion to be made at the same time, to change the venue and place of trial to Madison, on the ground that Madison was the proper county. The motions were heard together. In opposition to the plaintiff's motion an affidavit was read, stating that the defendant had six material witnesses in the county of Madison.

G. W. PECKHAM, *for Plaintiff.*

G. W. GRAY, *for Defendant.*

HARRIS, Justice.—As the plaintiff was a non resident, the county of the defendant's residence was "the proper county," for the venue (*Code*, § 125, 126). Having made the demand in the manner prescribed by the 126th section, the defendant was entitled to have the venue changed; and had his motion been made before the plaintiff was in a situation to present the question in reference to the convenience of witnesses, it must have been granted. The motion to change the place of trial on the ground that the proper county is not designated, may be made *before* issue joined, while the motion to change it for the convenience of witnesses, can only be made *after* issue joined.

In *Moore agt. Gardner* (5 *Howard* 243), it was held that the plaintiff, on receiving the demand that the trial should be had in the proper county, should have consented that the venue be

changed, and then have moved to change the place of trial for the convenience of witnesses. It does not appear from the report of that case whether at the time the motion was made, the action was or was not at issue. But even if the action had been at issue, the decision was right. The distinction between the *venue* and the *place of trial* then existed. Wherever the trial might be had, the record was to remain in the county of the venue. It was the right of the parties to have the venue in the proper county, even though the trial should be had elsewhere.

But the recent alteration of the 126th section of the Code seems to have abolished the distinction between the venue and the place of trial. It is now provided that when the place of trial is changed, the record is to go with it, so that now the venue can no longer be in one county and the place of trial in another. It would, therefore, be but an idle ceremony to change the venue to the proper county upon the application of one party, when it is made to appear by the other party that the convenience of witnesses requires that the trial should be had in some other county. This, I think, is the predicament of the case before me.

Although the defendant swears that he has six material witnesses residing in Madison, and the plaintiff has but four in Greenbush, I am satisfied from the character of the transaction and the pleadings in the case, that the convenience of witnesses requires that the trial should be had in Albany, rather than Madison. The transaction which resulted in the giving of the note which is the foundation of the action, occurred at Greenbush. The case presented by the plaintiff in his reply would entitle him to recover, if established by proof, even though the defence upon which the defendant relies should be proved also. The plaintiff's witnesses were present at the transaction in Greenbush, and it may well be that they will all be necessary to sustain his case. On the contrary, the defendant's witnesses are all required, according to his affidavit, to show the quality, condition and value of the hogs, on account of which the note was given, after they were taken to the city of New York. In view of the whole case, I am satisfied that the place of trial ought not to be changed, unless the question is to be controlled by other considerations presented by the defendant's counsel upon the argument.



It is insisted that the plaintiff is not in a situation to present the question upon the convenience of witnesses, for the reason that no valid reply has been put in, and that, therefore, the cause is not at issue, or, if at issue, that the allegations of the answer, by way of defence, are admitted. This objection, if sustained by the facts, would, undoubtedly, be well taken. Though it has been the occasion of a diversity of opinion among judges, I think it is now pretty well settled that a motion to change the place of trial for the convenience of witnesses, before issue is joined, is premature (*Lynch vs. Mosher*, 4 *How. Pr. R.* 86; *Barnard vs. Wheeler*, 3 *id.* 71; *Clark vs. Pettibone*, 2 *Code Rep.* 78; *Hartman agt. Spencer*, 5 *Howard*, 135; *Mixer vs. Kuhn*, 4 *id.* 409).

But I think this cause was at issue when the notices of these motions were served. The defendant's attorney gave notice that he should not accept the reply, on the ground that it was not properly verified. Even assuming that the verification was defective, it may be doubted whether the defendant's attorney had the right to decide that question for himself. But conceding that he might, his decision certainly is not conclusive upon any body else, and if it should appear that he was mistaken, the pleading must be held to be regular. The ground upon which the verification was regarded as defective by the defendant's attorney was, that the material allegations in the reply were not within the personal knowledge of the attorney. The defendant's attorney could not have carefully noticed the provisions of the 157th section of the Code in this respect. The affidavit of the attorney is allowable in two cases; when the action or defence is founded on a written instrument in his possession, and when all the material allegations of the pleading are within his personal knowledge. The plaintiff's attorney shows his right to make the affidavit under the former of these provisions. Of course it is unnecessary for him to bring himself within the latter.

Nor do the authorities cited by the defendant's counsel sustain his position that because the plaintiff's witnesses do not reside in Albany they are not to be regarded in determining the question of venue (*Peet vs. Billings*, 2 *Wend.* 282; *Bank of St. Albans, vs. Knickerbacker*, 6 *id.* 541; *Hull vs. Hull*, 1 *Hill*, 668; *Brittan vs. Peabody*, 4 *Hill*, 68, *note*). All that has ever been

decided on this subject is, that it will be deemed most convenient for witnesses to attend court in the county in which they reside, even though their place of residence may be nearer the court house in some other county. It has never been held that, in a case like this, where the witnesses reside within a mile of the place where it is sought to have the trial take place, they are to be disregarded in determining the place of trial because they do not reside in the same county. The plaintiff is entitled to have the trial in Albany, and the prevailing party upon the trial is entitled to ten dollars for the costs of these motions.

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## SUPREME COURT.

KING agt. THE UTICA INSURANCE COMPANY.

If a party make distinct, though immaterial allegations, and in a traversable form, he can not move to strike out his adversary's pleading, taking issue thereon.

*Franklin Special Term, February 1852.* This was a motion to strike out certain portions of a reply as immaterial, &c., for the reason that they took issue upon immaterial portions of the answer.

B. PERKINS, *for the Motion.*

J. R. FLANDERS, *Contra.*

HAND, Justice.—It is admitted by counsel that these issues are immaterial. No redundant, immaterial or impertinent matter, should be inserted in a pleading. And, as a general rule, if suffered to remain unnoticed, it will not aid the party. It is better to leave it out; and, if put in, strike it out. But if this is not done, and the truth of immaterial allegations is put in issue, the party making them should not complain. An independent issue should not be made upon every expression used in pleadings, perhaps rendered senseless by being thus severed. Such pleading might be obnoxious to a motion to expunge, or in some cases, to a motion for judgment (1 *Saund. Rep.* 28, n.; *Code*,

§ 148, 152, 154, 168, 247). The answer should only deny material allegations; and the new matter in the answer and reply should constitute a defence, &c. (§ 149, 153). The Code, however, does not, certainly not, in express terms confine the reply to "material" allegations (see § 153, 250); so the old rule, as to that, at least, remains. And if a party will make a distinct though immaterial allegation, and in a traversable form, I am not aware of any rule of pleading or practice by which he can prevent his opponent from denying its truth, or that requires the court to strike out that denial. The other party may, for safety, prefer in this way, to bar all presumptions that may possibly arise from the pleading. Both parties, at least under our former system, would run the risk of a repleader, unless the court, notwithstanding a verdict on the immaterial issues, can render judgment on the whole record. And the one committing the first fault, it seems, although such immaterial issues are found in his favor, may not have even the benefit of a repleader (see *Gordon vs. Ellis*, 7 *M. & Gr.* 607; *Atkinson vs. Davis*, 11 *M. & W.* 236; *Gwynne vs. Burnell*, 6 *Bing. N. C.* 453; *Parnham vs. Pacey*, *Willes*, 532; *Sargeant vs. Fairfax*, 1 *Lev.* 32; *Lovelace vs. Grimsden*, *Cro. El.* 227; *Lambert vs. Taylor*, 4 *B. & C.* 138; *Garland vs. Davis*, 4 *How. U. S. R.* 131; *Gould vs. Rae*, 13 *Wend.* 633; *Stafford vs. Mayor of Albany*, 6 *Johns. R.* 1; *Havens vs. Bush*, 2 *id.* 387; 2 *Saund. R.* 319, and notes to 6th ed.; *Code* § 148, 154, 168, 176). It is not necessary here to decide what notice must be taken of immaterial issues at the circuit (*Code*, § 250, 264-5; *Weed vs. Davis*, *Mss.* 4 *Dist.*; *Nelson vs. Bostwick*, 5 *Hill*, 43; *Carles vs. Wilkin*, 6 *Barb. S. C. R.* 564; *Kelly vs. Kelly*, 3 *id.* 420).

It would be better if the parties should mutually consent to reform some portions of the pleadings. Direct and material issues only, should be sent down to the circuit.

Motion denied.

## SUPREME COURT.

## KELLOGG agt. OLMSTED AND OTHERS.

The statute (*Session Laws of 1837, p. 537, § 73*) requires the heirs of a person dying intestate to be sued together jointly, and not separately, for a debt against the intestate. But it does not make them *jointly liable as joint debtors*.

It provides for securing each against the payment of any more than his share. Each heir is made a debtor for himself, and not for another to the extent of his equitable proportion of the debt of his ancestor.

Consequently, where a suit was brought against several heirs, some being served with process and others not. *Held*, that a judgment *in form* could not be entered against those not served. Nor could they be summoned to show cause why they should not be bound by the judgment (*Code, § 136, 375*). The judgment as against them, at least, was irregular.

*Albany Special Term, November 1851. Motion to set aside judgment as against the defendants James Johnson and Lois S. his wife, and S. Franklin Hill and Mary his wife.* The facts in the case are as follows: John Olmsted being indebted to Cyrus D. Sheldon died seized of real estate which was inherited by his eight surviving children, of whom Mrs. Johnson and Mrs. Hill were two—the plaintiff, as assignee of the debt due to Sheldon, brought this action against the heirs to recover his debt against the ancestor. The summons was served upon five of the heirs, four of whom were infants. For these a guardian was appointed, who put in an answer in their behalf. A referee to whom the cause had been referred reported that there was due to the plaintiff \$259.51, and the costs were taxed at \$62.49. The plaintiff entered judgment against all the defendants, including those not served with process, for \$319, debt and costs, on the 21st of August, 1850.

On the 15th of September 1851, the defendants Johnson and wife were served with a summons, requiring them to show cause why they should not be bound by the judgment. On the 7th of October a similar summons was served on Hill and wife. In the summons the plaintiff claims to recover against these defendants \$79.75 with interest thereon from the time the judgment was



entered. These defendants, by separate motions, ask to have the judgment set aside, as against them with costs.

H. M. RUGGLES, *for Plaintiff.*

GEORGE G. SCOTT, *for Defendants.*

HARRIS, Justice.—The heirs of every person who shall have died intestate, are declared by law to be liable for the debts of such intestate, to the extent of the real estate descended to them (2 R. S. 452, § 32). For this liability they must be prosecuted, either in a court of law or equity jointly, and not separately (*Session Laws 1837, p. 537, § 73*). In such a suit the amount which the plaintiff is entitled to recover must be apportioned among all the heirs, in proportion to the value of the real estate inherited by them, and such proportion alone shall be recovered of each heir. The costs are to be apportioned and recovered in the same manner (2 R. S. 455, § 52, 53). Though they must be sued together the statute creates no joint liability. On the contrary, it specifically provides for securing each against the payment of any more than his share. Each heir is made a debtor for himself, and not for another to the extent of his equitable proportion of the debt of his ancestor. In no sense, therefore, can the heirs be regarded as *joint debtors*.

The plaintiff has proceeded, as he would have been authorized to do if the defendants had been jointly indebted upon contract. It is only in such a case, that a judgment, even in form, may be entered against a party not brought into court. It is only in such a case, that a party not served with process may be summoned to show cause in the manner in which these defendants have been summoned (*Code, § 136, 375*). The defendants in this action, as we have seen, are not jointly liable, and therefore the plaintiff had no right to enter judgment against those who had not been served with process.

Whether the plaintiff had a right under the second sub-division of the 136th section, to proceed against such of the defendants as had been served with the summons, or whether it was necessary to bring them all into court, before he could proceed against any, it is not necessary now to decide. Nor is it necessary now to say whether the plaintiff can yet maintain an independent suit

against the defendants who are not affected by the judgment already entered. The law is imperative that heirs *shall be prosecuted jointly* and not separately—with such a statute in force, I am not prepared to say that a second action might be maintained.

On the other hand, it might, perhaps, be held that the statute referred to is so far modified by the second sub-division of the 136th section as to sustain the judgment against such heirs as were in fact made parties to the suit. However, these questions might be determined, this judgment, as against the parties who make this motion, is irregular. The motion, therefore, must be granted. The proceedings, as against these parties, subsequent to the judgment, must also be set aside.

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## SUPREME COURT.

SIMMONS agt. JOHNSON Adm'r.

Under the present Code, the decisions of a referee upon the whole issue, can not be reviewed nor a rehearing granted by a special term.

*The decision in the case of Church agt. Rhodes, ante page 281, approved.*

*Fulton Special Term, May 1852.* This was a motion to set aside the report of a referee in favor of the plaintiff, “as being against the weight of evidence, and also for a rehearing.”

M. FRASER, *for Defendant* .

M. & J. McMARTIN, *for Plaintiff*.

HAND, Justice.—The preliminary objection, that under the present Code the defendant has mistaken his remedy, is conclusive. The Code of 1849 authorized the court to grant a rehearing (§ 272). In the revision of 1851, and also of 1852, this clause was omitted (Church agt. Rhodes, 6 How. Pr. R. 281). The decision of a referee must now be reviewed “in like manner and not otherwise, as on a trial by the court” (Codes of 1851 and 1852, § 272). I find no authority in the Code to overrule the decisions of a single judge on a trial by the court, either by a

review or rehearing, at a special term (§ 268). An appeal "upon the facts," now lies to the general term from a judgment, entered upon a report of referees, or by the direction of a single judge (*Code of 1852*, § 348; and see *Graham agt. Milliman*, 4 *How. Pr. R.* 435). Where the report is upon the whole issue, no doubt judgment may be entered up thereon of course (§ 272, 278).

I thought this could not be done under the Code of 1848, for then judgment could not be entered except upon the direction of a single judge, in but two cases (*Code of 1848*, § 233). It was upon this section and some adjudged cases, that I decided *Deming vs. Post* (1 *Code R.* 120). The Code of 1849 expressly authorized the entry of judgment upon a report of referees (*Code of 1849*, § 278). It was upon that change of the statute, *Van Valkenburgh vs. Allendorf* (4 *How.* 39) was decided, and not upon any change of opinion.

The third and fourth Codes have retained this provision, and the same result follows (*Codes of 1851 and 1852*, § 278). That section also makes the judgment subject to a review at a general term, where, as we have seen, questions of fact may also now be examined (*Code*, § 348, 268). If the facts only are reported and the report, consequently, only amounts to a special verdict, judgment must still be given at a special term (§ 265, 268). It is not necessary here to decide, whether an equity case may not arise, where an application to a special term may still be proper; though it would seem *Church agt. Rhodes* (*supra*) was an equity case (see *Giles vs. Lyon*, 4 *Comst.* 599; *Burhans vs. Van Zandt*, 7 *Barb.* 91; *Griffing agt. Slate*, 5 *How. Pr. R.* 205). For this is a case at law, and all the issues were referred.

There have been a variety and contrariety of opinions upon this question of reviewing the report of referees (*Raynor vs. Clark*, 7 *Barb.* 581; *Wilson vs. Allen*, 6 *id.* 542; *Pepper agt. Goulding*, 4 *How.* 310; *Leggett agt. Mott*, *id.* 325; *S. C. 2 Sandf. R.* 720; *Lusk agt. Lusk*, 4 *How.* 418; *Enos agt. Thomas*, 5 *id.* 361; *LaWall agt. Grigg*, *id.* 158; *Nones agt. Hope Mutual Ins. Co.* *id.* 157; *Renouil vs. Harris*, 2 *Sandf.* 641; and see *Ball agt. Syracuse and Utica R. R. Co.* 6 *How. Pr. R.* 198, and the cases before cited). But I think Mr. Justice GRID-

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Porter agt. Lee.

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LEY in Church agt. Rhodes lays down the correct practice, particularly in cases at law; and as there seems to be an ample remedy by an appeal, I am inclined to follow that decision in this case. The motion there was made after judgment, but I think that does not alter the case.

Motion denied with costs.

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## SUPREME COURT.

PORTER agt. LEE.

IN PARTITION.

*Erie Special Term, April 1852.* This was an action for partition of lands commenced by service of summons and complaint on the defendant, who was of age and a resident. He had appeared by attorney but had not answered or demurred to the complaint. Lee was the sole defendant in the action.

C. D. NORTON, on affidavit showing these facts, and on notice moved for the appointment of commissioners.

Mr. COLEGROVE, for the defendant, said that the defendant admitted all the allegations of the complaint, and that the same set forth correctly the rights and interests of the parties to the action, and he was willing that commissioners should be appointed if the court should decide that practice to be correct.

HOYT, Justice—after examining the papers said on a subsequent day in term, that if judgment was to be taken by default, there must be a reference to the clerk to take proof of the title and rights of the parties before the appointment of commissioners.



## SUPREME COURT.

VAN STEENBURGH agt. HOFFMAN.

The report of a referee to whom all the issues are referred must state all the material facts put in issue and found by him, as well as his conclusions of law. The unsuccessful party has a right to have these placed upon the record.

No notice of the report or service of a copy thereof is necessary before entering up judgment.

*It seems* in all cases every material issue should be passed upon, at least, if desired by the parties.

*Fulton Special Term, May 1852.* This was a motion for the purpose among other things, of having the judgment entered up on a report of a referee set aside; and that the referee, state the facts found by him and his conclusions of law.

A. MEEKER, *for the Motion.*

J. W. CULVER, *Contra.*

HAND, Justice.—This was an action to recover money only, and in such cases, the jury in their discretion, may render a general or special verdict (*Code*, § 261). But the court may require the jury “to find upon particular questions of fact” (*id.*). And this finding controls the general verdict (*id.* § 262). It is not necessary, in this case, to decide whether the court, where a trial by jury is waived, may make a general decision, without finding all the issues, separately. In strictness, as I understand the old practice, although in many cases, a general verdict was taken; yet, particularly where there were different causes of action, or where the finding upon one issue did not necessarily dispose of all of the rest, the issues were, as a general rule, all passed upon (1 *Burr. Pr.* 236; *Van Benthuyssen vs. DeWitt*, 4 *J. R.* 213; *Graves vs. Morley*, 3 *Lev.* 55; *Patterson vs. U. S.*, 2 *Wheat. R.* 22; *Hanna vs. Mills*, 21 *Wend.* 90; *Boynton vs. Page*, 13 *id.* 425; 3 *Chitt. Gen. Pr.* 476-7; and see *Moore vs. Butlin*, 7 *Ad. & E.* 595; 1 *Saund. R.* 27, 28, *n. d.*, 6 *ed.*). That would seem to be correct practice under our new system of pleading.

If desired by either party, on a trial by the court, surely the material facts should be stated (and see the practice under the new system of pleading in England, 3 *Chitt. Gen. Pr.* 919, 921). But however that may be, the referee must state all the material facts put in issue and found by him. The unsuccessful party has a right to have these, as well as his conclusions of law, placed upon the record (*Code*, § 272, 281, 348).

Where all the issues are referred, the prevailing party need not give notice of the report, or furnish a copy of it. Judgment is of course (*Code*, § 278, 272).

Perhaps the report could be amended, *nunc pro tunc*; but this might deprive the defendant of his appeal. The report must be corrected, and a new judgment can then be entered up thereupon.

Ordered accordingly.

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## SUPREME COURT.

COLLINS agt. STANDISH JR.

COSTS (*On statute foreclosure*).

——— *Special Term*, ——— 1852. *Taxation of costs upon statute foreclosure.* The facts appear in the opinion below.

B. F. AGAN, *for Taxation.*

J. C. HOPKINS, *Opposed.*

HARRIS, Justice.—The first objection to the bill presented for taxation involves the question, whether the notice of sale is unnecessarily long. It is charged in the bill at 17 folios. It in fact contains about 14 folios. Of this, about one half is made by the recital of various assignments of the bond and mortgage. All this was unnecessary. All that the statute requires in this respect is that the notice should specify the names of the mortgagor and mortgagee, and the assignee, if there be any. Nearly another folio is occupied with the statement of the fact that a judgment had been recovered upon the bond, and an execution had been

issued thereon and returned unsatisfied. Nothing of this kind is required to be inserted in the notice (2 R. S. 546, § 4). The notice is otherwise unreasonably prolix. All that the statute required to be inserted in such a notice might well have been embraced within the limits of six folios; but I shall tax it at *eight*. To allow more than this, would be a violation of duty (2 R. S. 653, § 5).

The next objection relates to the time of publication. Though it was continued twenty six weeks, it is insisted that the expense of only twenty-four weeks publication can be allowed. This is the language of the statute (2 R. S. 652, § 4, *sub*. 3). That provision was inserted in the statute when it was necessary to continue the notice for twenty-four weeks. When the time for publication was reduced to twelve weeks, by the act of 1842, this section was left unchanged. But in a case like this, the limitation specified ought not to be applicable. The party resisting this taxation obtained an injunction restraining the assignee of the mortgage from selling, but allowing the continuance of the notice. The notice must have been continued or the assignee would be subjected to the loss of the expenses already incurred. In this way, the sale was necessarily delayed, and that too, by the act of the party now to be charged with the costs, until the notice had been continued twenty-six weeks. Under these circumstances, I think, it does not lie with him to object to the length of the time of publication. I shall, therefore, allow for the publication of the notice for the whole period of twenty six weeks. The proof before me is sufficient to authorize an allowance of the fees fixed by statute for printing the notice (2 R. S. 648, § 45).

The costs of a statute foreclosure, except as modified by the act of 1844, are the same now, as when the Revised Statutes were enacted. The attorney is to be allowed for drawing the advertisement and other proceedings, and for all necessary copies, the same fees, and at the same rates of compensation, as attorneys were allowed for the draft and copies of pleadings under the fee bill of 1830 (2 R. S. 652, § 4, *sub* 1). This rate of compensation has not been changed by any of the subsequent changes in the fee bill.

The act of 1844 makes an allowance of one dollar for serving each copy of the notice of sale required by law. I think this allowance is distinct from, and in addition to the charge for making the copy of the notice to be served. But neither the copy notice nor the charge for serving can be allowed, except in cases where the service of such notice is rendered necessary in order to effect a complete foreclosure. Those cases are specified in the third subdivision of the fourth section of the act relating to the foreclosure of mortgages by advertisement, as amended in 1844. The persons who are to be served with such notice are the mortgagor himself, or his personal representatives; subsequent grantees and mortgagees whose conveyances and mortgages are upon record, and persons having a lien upon the premises by judgment or decree junior to the lien of the mortgage. It is not pretended that any of the persons served with notice in this case are within the description of the statute, except the mortgagor himself. If, therefore, the attorney who conducted the foreclosure has seen fit to serve notices of the sale upon other persons than those mentioned in the statute, he can not be allowed for such services as a lawful charge upon the foreclosure. It may have been a prudent measure to serve such notices, but not being required by law, they are not taxable against the party who is liable for the expenses of the foreclosure.

Upon the principles thus briefly stated the following items only of the bill before me are taxable:

|                                                   |        |
|---------------------------------------------------|--------|
| Dr. notice of sale fo. 8 and copy at 3s., .....   | \$3·00 |
| Copy notice for printer at 1s., ....              | 1·00   |
| Copy notice for posting at 1s., ....              | 1·00   |
| Dr. and copy affidavit of posting fo. 2., ....    | 75     |
| Copy notice annexed fo. 8, .....                  | 1·00   |
| Oath to same, .....                               | 12½    |
| Printer publishing 26 weeks at 8 fo., .....       | 44·00  |
| Dr. affidavit of publication fo. 3 and copy, .... | 1·12½  |
| Oath to same, .....                               | 12½    |
| Copy notice annexed fo. 8, .....                  | 1·00   |
| Copy notice to serve on mortgagor, ....           | 1·00   |
| Serving notice, ....                              | 1·00   |
| Dr. and copy affidavit of service fo. 2, ....     | 75     |



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 Collins agt. Standish Jr.
 

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|                                                                           |       |
|---------------------------------------------------------------------------|-------|
| Copy notice annexed 8s., oath 1s., .....                                  | 1·12½ |
| Postage on letter to clerk and answer, .....                              | 10    |
| “ “ have notice posted, .....                                             | 10    |
| “ two adjournments, .....                                                 | 20    |
| Clerk's fees for searches, .....                                          | 2·26  |
| Dr. affidavit of circumstances of sale, fo. 4 and copy and<br>oath, ..... | 1·62½ |
| Superintending sale, &c., .....                                           | 10·00 |
| Recording affidavits (fees actually paid), .....                          |       |

The bill presented contains other charges for services which have been actually and necessarily rendered, such as posting the notices of adjournment and affidavits, showing that such notices were duly posted. But the legislature has provided no compensation for such services. It has declared that in the taxation of the costs and expenses of foreclosure, the allowances mentioned in the 4th section of the act above referred to, and *those only* shall be taxed.

## INDEX—GENERAL.

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On completing the present (6th) Volume some care and labor have been bestowed, in making a *double* Index, to comprehend the subjects in the Volume, under various and conspicuous heads.

It is believed that the Profession will find it an improvement of some importance.

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**In Slander.** SEE SLANDER. *Anibal agt. Hunter*, 255.

**In relation to stating several defences separately &c.** *Benedict agt. Seymour*, 298.

**An answer denying in terms specifically each material allegation of the complaint, without particularizing the allegations, is in effect a general denial, and is therefore insufficient.** *Seward agt. Miller*, 312.

**It is not however sham or irrelevant, and can not be stricken out on motion, id.**

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**An answer denying "knowledge or information sufficient to form a belief," of a material fact alleged in the complaint, forms a good issue upon which the plaintiff holds the affirmative; and which gives to the defendant, on the trial, all the benefits of introducing proof which he would have on a positive denial. The code makes no difference whether the proceedings are verified or not.** *Snyder agt. White*, 321.

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**When defendant not allowed to amend his answer, id.**

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**BILL OF EXCEPTIONS**, where irregularities in settling a bill of exceptions are complained of in the appellate court, they will stay proceedings for an application to be made in the court below (where it properly belongs) for correction. *People agt. Baron*, 81.

A bill of exceptions when *attached* to the judgment roll becomes a part of it by the last clause of § 264, the same as if incorporated in the roll. *Schenectady Plank Road Co. agt. Thatcher*, 226.

A bill of exceptions should be settled, signed and sealed by the justice or court to whose decisions the exceptions were taken. *Morse agt. Evans*, 445.

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**CA SA**, in an action for escape under a ca. sa. the sheriff can not avail himself of the irregularity, that the ca. sa. issued without a fi. fa. having been previously issued and returned *nulla bona*. *Hutchinson agt. Brand*, 73.

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A complaint containing necessary facts verified positively, may be used to obtain an injunction. *Minor agt. Terry*, 208.

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Nor can a portion of a complaint be thus stricken out, without pointing out clearly what portion is objectionable, *id*.

It seems, that a complaint containing allegations of fraud, which are substantially the same as are necessary in an indictment for obtaining goods under false pretences, constitute a good cause of action, *id*.

It is not necessary to aver express malice or want of probable cause, in a complaint for libel. *Purdy agt. Carpenter and Ferris*, 361.

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A defendant is not bound to return such a complaint as defective. He may serve his answer without a verification, *id.*

In an action against a surviving partner joined with the representatives of a deceased partner upon a contract made by the copartnership when in existence, the prayer of the complaint should clearly define the grounds of relief against each party. *Ricart agt. Townsend*, 460.

**COSTS**, where several defendants defend successfully by different attorneys, who are partners, but one bill of costs can be allowed. *Crofts agt. Rockefeller*, 9.

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An extra allowance can be had in an action brought to restrain the foreclosure of a mortgage. It is not a case within § 309, *id.*

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In relation to witnesses fees. *Dowling agt. Bush*, 410.

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On putting off a cause at the circuit only \$10 besides witnesses fees can be imposed. *Noxon agt. Bentley*, 418.

Where the case is directed to be first heard at a general term, the successful party can not have costs as on appeal. *Fellows agt. Sheridan*, 419.

*It seems*, that on a motion for a new trial in such cases, the court may grant the costs of a motion, not exceeding \$10, *id.*

Where the plaintiff set forth nineteen different claims against the defendant and demanded judgment for \$3000; and on a reference it appeared that a portion of the claims were unfounded, and the referee reported \$1161.02 due the plaintiff, *held*, that the plaintiff was not entitled to a *per centage*, by way of indemnity, although it appeared that the hearing consumed a portion of four days. *Sands agt. Sands*, 453.

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**COURT OF APPEALS**, where the object of the appeal from the judgment was to review an *order* made by a judge at chambers, denying a motion of the appellant to remove the cause into the Circuit Court of the U. States, and the record showed that no appeal had been taken from that order, to the court below, *held*, that the appeal could not be sustained. *Kanouse agt. Martin*, 240.

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SEE MOTION. *Howell agt. Fraser*, 221.

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An issue of law on demurrer, where may be tried. *Ward agt. Davis*, 274.

When a demurrer will be allowed after the time of serving one has passed. *Seward agt. Miller*, 312.

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Interrogatories, after the manner of a former creditor's bill, of discovery, inserted in a complaint, can not be reached by demurrer. *Bank of British N. A. agt. Suydam Jr. &c.*, 379.

A demurrer to the whole complaint, assigned several causes, that extended to the whole complaint; but other parts or specifications of the demurrer, alleged that certain specified portions of the complaint were redundant, immaterial and uncertain; motion to strike out the last mentioned specifications in the demurrer as irrelevant, redundant, impertinent, &c. *denied*. *Quere*—Whether § 160 of the Code applies to demurrers? *Smith agt. Brown*, 383.

**DISCONTINUANCE**, the plaintiff in an action to recover the possession of personal property where the property has been delivered to him, and after issue upon a plea or answer entitling the defendant to a return, &c., can not discontinue the suit by an entry of a rule and payment of costs. Though as a general rule, he may discontinue as a matter of course, (on payment of costs) at any time before verdict, writ of inquiry or rule for judgment. *Wilson agt. Wheeler*, 49.

**ERRATA**, on page 424, COLE respondent agt. STEVENS appellant, in the head note, *first* paragraph, last line, strike out the words "*under the act of 1842.*" *Second* paragraph, strike out the whole sentence *after the first period in the second line.*

On page 443, WESTON agt. HATCH Executor, &c., in the head note, last line, after the word "examination" insert the words "*as a party.*"

**EVIDENCE**, the evidence required to disprove the facts alleged in petitions of rail road companies, for taking lands for their roads. *Buffalo & State Line R. R. Co. agt. Reynolds and wife*, 96.

A non resident debtor, not a competent witness in an action on the attachment bond given by him, although not nominally a party. *Mitchell agt. Weed*, 128.

Where a plaintiff, after suit brought, transfers his interest, the assignee should not be allowed to be substituted as plaintiff where the object principally is to make the original plaintiff a witness. *Harris agt. Bennett*, 220.

*Held*, that a husband is a competent witness to prove a marriage (where the wife sues alone for her separate property). *Willis agt. Underhill*, 396.

Where a demand is transferred merely for the purpose of making the assignor a witness to prove it, the defendant should be allowed to become a witness on the opposite side, *id.*

In an action against an executor, for work, labor and services done for the ancestor, a *residuary legatee* under the will, is a competent witness for the executor. The witness has not such an *immediate benefit* in the action, as would authorize his examination, as a party, under § 396 of the Code. *Weston agt. Hatch*, 443.

**EXECUTION**, a "wagon" is by no act of the legislature exempt from levy and sale under execution, *Morse agt. Keyes*, 18.

Error either in judgment or process, no excuse for a sheriff in action for escape. It is only on *void* process only which will protect him. *Hutchinson agt. Brand*, 73.

Not irregularly issued against surviving defendants to collect costs ordered on denial of a motion, where one defendant dies before motion made and no mention of it in motion papers. *Lucas agt. Johnson*, 121.

An execution must follow the judgment and be warranted by it. *Corwin agt. Freeland*, 241.

In relation to arrest on final process, under § 179 of the Code, *id.*

Fractions of a day not regarded in filing execution, and issuing order of arrest. *Jones agt. Porter*, 286.

The true criterion for issuing an execution against the *person* of a defendant after judgment, is this, could the defendant have been arrested before judgment, under the provisions of the chapter relating to arrest and bail. *Masten agt. Scovill*, 315.

(*Contra*, *Gridley agt. Macumber*, 5 *How.* 414, and *Corwin agt. Freeland*, ante page, 241.)

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The remedy heretofore given by *scire facias* to obtain execution of a judgment, is superseded by the provisions, for an action therefor under the Code. *Cameron and McKay agt. Young*, 372.

Property exempt from execution by the provisions of the Revised Statutes (2 R. S. 367) can not be taken upon execution issued upon a judgment rendered for other exempt property.

The provisions of the Revised Statutes in regard to property exempt from execution are not affected by the additional act of 1842.

The case of *Matthewson vs. Weller*, 3 *Denio*, 52, so far as it seems to hold a different doctrine overruled. *Cole agt. Stevens*, 424.

(The last three paragraphs above, are the correct head note to the case of *Cole agt. Stevens*, 424. The original note is wrong so far as it differs from this. See ERRATA.)

**EXECUTOR AND ADMINISTRATOR**, a claim against an estate, when not unreasonably resisted, *Comstock agt. Olmsted*, 77.

A certificate of the referees that the claim was unreasonably resisted is no evidence, *id.*

Costs can only be recovered where the administrator refuses to refer or unreasonably resists or neglects the claim, *id.*

Where agreement to refer is not filed with the clerk and no order of reference entered—the court does not get jurisdiction, *id.*

A cause of action arising upon a tort for the taking or conversion of personal property which survives the party and goes to the executors or administrators, is assignable. *Robinson agt. Weeks*, 161.

In an action against an executor for work, labor and services done for the ancestor, a *residuary legatee* under the will, is a competent witness for the executor. The witness has not such an *immediate benefit* in the action, as would authorize his examination as a party, under § 396 of the Code. *Weston agt. Hatch*, 443.

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**HUSBAND AND WIFE.** SEE PARTIES, *Coit agt. Coit*, 53.

SEE PARTIES, *Cook agt. Rawdon*, 233.

*Held*, that a *husband* is a competent witness to prove a *marriage* (where the wife sues alone for her separate property). *Willis agt. Underhill*, 396.

That a *feme covert* can take a gift or assignment of a *debt* as well as of other personal property, and hold the same "to her sole and separate use," &c., in like manner and with the like effect as if she was unmarried, *id.*

That in an action concerning her separate property, she is not bound to join her husband but may sue *alone*, *id.*

That she must however have a *next friend*, although she sues alone, *id.*

That the objection may be taken at any stage of the suit, but the court may in its discretion, allow an appointment of a *next friend*, *nunc pro tunc*, *id.*

**I**NJUNCTION, a reference to ascertain damages upon an injunction bond, filed under the 31st rule of the late Court of Chancery, is not required, where the bond does not contain the clause providing for a reference. The remedy is by action on the bond. *Higgins agt. Allen*, 30.

Where the plaintiff appears to be entitled to a decree for a perpetual injunction, he may have a temporary injunction also, *pendente lite*, provided it is necessary to protect him from injury. The law in regard to injunctions has not been materially changed. (*Contra, see Cure agt. Crawford*, 5 *How.* 293.) *Corning agt. The Troy Iron & Nail Factory*, 89.

Plaintiff must show himself entitled to final relief by injunction to entitle him to a temporary injunction, *id.*

The obstruction of water courses are such grievances as call for the equitable remedy by injunction, *id.*

An injunction can only be granted or sustained upon *affidavit*, and where the complaint praying an injunction is duly verified, it may be used to obtain or uphold an injunction. But where the complaint is not so verified, the party must rely upon the affidavit alone for obtaining or sustaining it. *Smith agt. Reno*, 124.

It is no answer to a motion to dissolve an injunction that the defendant has violated it (*contra, Krom agt. Hogan*, 4 *How.* 225), *id.*

What facts and allegations are necessary to warrant the issuing of an injunction, *id.*

When party may have an order or attachment for a violation of injunction, *id.*

A notice of motion to dissolve an injunction, which states that the motion will be founded on a "copy of the injunction and papers served therewith on the defendant" held, sufficient. *Newbury agt. Newbury*, 182.

It is not necessary on such a motion to state that an action has been commenced, *id.*

Facts stated upon which an injunction was vacated, *id.*

Where a complaint states all the facts necessary to lay the foundation for an injunction and the plaintiff swears to them positively, the complaint may be used as an affidavit for the purpose of obtaining an injunction. *Minor agt. Terry*, 208.

Upon balancing evidence, it is a matter of judicial discretion to dissolve an injunction or not, *id.*

Where during the pendency of an action, it shall appear by affidavit, that the defendant threatens, or is about to remove or dispose of his property, with intent to defraud his creditors, a temporary injunction may be issued, under the last clause of § 219 of the Code, to restrain such removal or disposition. But such remedy by injunction is only applicable where the act is threatened, or is about to be done. *Perkins & Brown agt. Warren*, 341.

What facts necessary to entitle a party to an injunction in such case, *id.*



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Where it appears by the *complaint* that the plaintiff is entitled to the *relief demanded*, and that it consists in restraining the defendants from a disposition of the property claimed, which, if permitted, would be an *injury* to plaintiff, he is entitled to a temporary injunction under the *first* clause of § 219 of the Code. *Malcolm agt. Miller*, 456.

The *latter* clause of § 219 is applicable, where *during the pendency* of the action, it shall appear by affidavit that the defendant threatens, or is about to remove or dispose of his property, &c., a temporary injunction may issue, *id.*

The first clause does not provide for a case arising *after* action commenced and the second clause does not provide for a case arising *before* action commenced, *id.*

On motion to dissolve the injunction upon complaint, answer, reply and affidavits, the whole may be examined to ascertain the necessary facts, although there is a denial on oath, in the answer, of the facts alleged in the complaint, *id.*

**IRRELEVANT AND REDUNDANT MATTER**, such matter should be struck out of an answer, when not material to the issue. *Rensselaer & Washington Plank Road Co. agt Wetsel*, 68.

Same matter struck out for same reason in the case of *Stewart agt. Bowton*, 71.

An entire complaint can not be stricken out as irrelevant or redundant on motion. *Benedict and others agt. Dake*, 352.

Nor can a portion of the complaint be stricken out on such motion, as irrelevant or redundant, where there is no specification of what portion is objectionable, *id.*

What is irrelevant or redundant matter in an answer. *Nichols agt. Jones*, 355.

Irrelevancy is remedied by *striking out*. *Bank of British N. A. agt. Suydam, Jr. &c.*, 379.

*Quere*—Whether § 160 of the Code applies to demurrers? *Smith agt. Brown*, 383.

The 160th section of the Code, providing for striking out irrelevant and redundant matter, was not intended as a substitute for a demurrer. *Harlow agt. Hamilton*, 475.

Irrelevant or redundant matter may be contained in a pleading which contains a good cause of action or defence, *id.*

In reference to frivolous pleading, *id.*

**JUDGMENT**, to warrant a judgment under the 247th section of the Code, the case should be entirely clear. *Rae agt. Washington Mutual Ins. Co.*, 21.

In actions for the possession of personal property—when defendant entitled to judgment, &c. *Wilson agt. Wheeler*, 49.

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Where there is an issue of law and of fact joined, no judgment for costs can be entered in favor of the party who prevails upon the issue of law, until the issue of fact is disposed of. *Masters agt. Brainard*, 113.

A judge at chambers, overruling a demurrer as frivolous, and ordering judgment, but with leave to amend, is a decision which must be appealed from as a *judgment*, not an order. *King agt. Stafford*, 127.

In all cases of appeal, from the Circuit Court, the judgment on the appeal should be certified to the clerk with whom the roll is filed, to be there entered and docketed. *Andrews agt. Durant*, 191.

Applications for the set off of judgments are addressed to the discretion of the court, and will be allowed, where equity will be promoted. *Baker agt. Hoag*, 201.

SEE REFEREES, *Holmes agt. Slocum*, 217.

A bill of exceptions *attached* to a judgment roll is equally sufficient with one with the exceptions incorporated in the roll. *Schenectady Plank Road Co. agt. Thatcher*, 226.

The duties of the clerk in entering judgment, *id.*

Papers which do not constitute a part of the judgment roll, *id.*

In an action against several defendants upon *joint* contract—not joint and several, a several judgment can not be rendered for or against one of them only, where no personal defence or disability to contract exists on the part of such defendant. *Fullerton agt. Taylor*, 259.

A party who has judgment *in his favor*, may, on application to the court, under § 174 of the Code, have redress, or be relieved, the same as though judgment was *against* him. *Montgomery agt. Ellis*, 326.

Where a judgment entered at special term, is appealed to the general term, and is there affirmed, a *new judgment* should *not* be entered. The simple judgment of affirmance, with the award of costs (if any) should be attached to the original judgment roll. It is improper to enter up two judgments in the *same court* for the same demand. *Eno agt. Crooke*, 462.

*It seems*, that the old practice of entering a new judgment upon an appeal will still apply, where the appeal is brought from a judgment of an *inferior court*, to the Supreme Court, *id.*

**JURISDICTION**, where the Court of Appeals remit their judgment and proceedings to the court below to be executed, and the court below become legally possessed of the case, it has no power or discretion to grant an order remitting back such judgment and proceedings to the Court of Appeals (for correction) without the assent or direction of the latter court, by resolution or order. *Vermilye agt. Selden*, 41.

(*Contra*, see *Murray vs. Blatchford*, 2 *Wend.* 221).

Where an attachment has been issued, and no summons served, the court, by § 139, have jurisdiction and control of the proceedings for the purpose of reviving and continuing the action in the name of the representative of a deceased party. *Moore agt. Thayer, &c.*, 47.

What proceedings are necessary to give the court jurisdiction to refer in cases of claims against estates. *Comstock agt. Olmstead*, 77.

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Where the printed cases, or error books, do not show a return made by the clerk below, the appellate court have no authority to hear the argument. *People agt. Baron*, 81.

A justice of the Supreme Court has no jurisdiction to make an order that a defendant in a judgment in the *County Court* appear before a referee and make discovery, &c. *Blake agt. Locy*, 108.

A motion to vacate such an order may be made before any justice, *id.*

Judges return made to a certiorari after they had gone out of office, held valid. *Harris agt. Whitney*, 175.

All the judges should meet in determining an appeal from commissioners of highways, *id.*

In relation to power to regulate costs in certain proceedings commenced in the *County Court*. *People agt. Townsend*, 178.

A justice of this court, at special term, has power to hear and decide a motion for a new trial, on the ground that the verdict is against evidence. *Ball agt. Rail Road Co*, 198.

A written stipulation by the parties to refer a cause to a referee "to hear and report thereon," is sufficient to confer jurisdiction and sustain the judgment, although the referee may *not have been sworn*, or a *rule of court entered* upon his appointment. The court will order a rule entered *nunc pro tunc*, if necessary. *Whalen agt. Supervisors of Albany*, 278.

Where the parties appear and argue the cause before the referee, without objection, it is a waiver of such defects, *id.*

The court will not regard fractions of a day, in judicial proceedings, unless to prevent injustice. *Jones agt. Porter*, 286.

And it seems this rule will be adhered to in considering a jurisdictional question, *id.*

The court or judge before whom a motion is to be heard, must make the order to show cause, prescribing a shorter time for service than eight days. *Merritt agt. Slocum*, 350.

A county judge has no authority to make an order staying proceedings in an action pending and triable in another county (*Contra, Peebles agt. Rogers*, 5 How. 208). *Chubbuck agt. Morrison*, 367.

No judge has the right arbitrarily to make an *ex parte* order staying proceedings in an action for a given period, or twenty days (§ 401), *id.*

The act conferring upon the Recorder of the city of Troy the powers of a justice of the Supreme Court at chambers (*Sess. L. 1849, p. 164, § 4*), held to be unconstitutional and void. *Griffin agt. Griffith*, 438.

**M**ERITS, the sufficiency of an affidavit, in changing place of trial. *Jordan agt. Garrison*, 6.

A formal affidavit of merits under rule 39 should be made on a motion to open a judgment confessed voluntarily, and the grounds for the motion should be stated specifically, general allegations will not answer. *Ellis agt. Jones*, 296.

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**MOTION**, a motion to strike out a demurrer as "*irregular and frivolous*" (under § 247) is not a motion for judgment on the demurrer. *Rae agt. The Washington Mutual Ins. Co.*, 21.

Motions in actions triable in Erie County must be made in the 8th district. *Inglehart agt. Johnson*, 80.

Where an appeal is taken from an order of the circuit judge, putting the cause over the circuit on certain conditions. A motion to dismiss such appeal should be made at the *general term*. *Barnum agt. Seneca County Bank*, 82.

In relation to entitling affidavits and the requisites of a notice of motion, &c. *Blake agt. Locy*, 108.

Motion to vacate an order improperly granted, may be made before any judge, *id.*

Where notice of motion for a commission is served by defendant without unnecessary delay, and before notice of trial served by plaintiff, the defendant will not be charged with plaintiffs costs of preparing for trial. *Brokaw agt. Bridgman*, 114.

But otherwise where motion papers are served after notice of trial or delay, *id.*

In motions that are to be heard on the pleadings, it is never necessary to serve copies on any of the parties to the suit. *Newbury agt. Newbury*, 182.

It is not necessary to serve an affidavit stating that an action has been commenced, on a motion to vacate an injunction order, *id.*

After judgment final entered under § 265, a motion for a new trial on the ground that the verdict is against evidence can not be entertained. *Ball agt. Rail Road Co.*, 198.

The remedy is by motion, where a pleading is correct in substance but not in form. *Howell agt. Fraser*, 221.

The particular grounds of a motion should appear plainly, either by the notice of motion or the affidavits. *Ellis agt. Jones*, 296.

Where a motion to open a judgment voluntarily confessed, is made, the specific grounds of the motion must be stated; general allegations will not answer, *id.*

The decision of a motion is never regarded in the light of *res adjudicata*. As a matter of settled practice, however, it can not be renewed on the same or additional facts, without leave of the court. *Snyder agt. White*, 321.

A non suit will not be set aside on a special motion, on the grounds that the judge received evidence prematurely, or refused to submit to the jury a question of fact proper for their determination. Erroneous decisions of the judge on the trial, can not be corrected only on a case or bill of exceptions. *Craig agt. Fanning*, 336.

The court or judge before whom a motion is to be heard, must make the order to show cause prescribing a shorter time for service than 8 days. *Merritt agt. Slocum*, 350.



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Motions when made to strike out defective answers, &c. *Nichols agt. Jones*, 355.

**NON RESIDENT DEBTOR**, SEE AFFIDAVIT AND ATTACHMENT. *Colver agt. Van Valen*, 102.

It seems that proceedings may be had against a defendant, when his last known place of residence was within this state, but his residence at the time can not, on due inquiry, be ascertained by the plaintiff or his attorney. *Close agt. Van Husen*, 157.

It seems the act of April 12, 1842, ch. 277 (*Laws of 1842*, p. 363) is still in force, *id.*

SEE ACTION AND PARTIES. *Bank of British N. A. agt. Suydam, Jr., &c.*, 379.

**NOTICE**. Notice of a motion to correct a pleading must be given within twenty days after service of such pleading (*Rule 43*). *Rogers agt. Rathbone*, 66.

A person liable to pay costs on a foreclosure under the statute, on whose requisition the costs are taxed, is entitled to notice of such taxation. *Matter of Moss*, 263.

A notice of assessment to the defendant in an action on contract for the recovery of money only, under § 246 is not necessary where the complaint is properly verified. *Southwark agt. Curtis*, 271.

**PARTIES**, the wife can not sue her husband without appearing by a next friend, except in the single case of an action for an absolute divorce (*see 4 How. 232*). *Coit agt. Coit*, 53.

Where a plaintiff, after suit brought, transfers his interest, the assignee should not be allowed to be substituted as plaintiff, where the object principally is to make the original plaintiff a witness. *Harris agt. Bennett*, 220.

A guardian for an infant wife, who joins with her husband as plaintiff, is not necessary, unless the action is to recover her separate property. *Cook agt. Rawdon*, 233.

It seems, where the action is to recover her separate property the husband can not be a guardian or next friend, *id.*

Where a complaint, in the nature of a creditors bill, against the original debtors and their assignees, seeks to set aside the assignment made for the benefit of creditors; it is not necessary to make *all the creditors parties defendant*. *Bank British N. A. agt. Suydam, Jr. &c.*, 379.

SEE HUSBAND & WIFE. *Willis agt. Underhill*, 396.

Under the Code, it is no misjoinder of parties, to unite the surviving partner with the representatives of the deceased partner, in an action on a contract made by the copartnership, when in existence (*otherwise under the former system*). *Ricart agt. Townsend*, 460.

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The prayer of the complaint in such an action, should clearly define the grounds of relief against each party, *id.*

A principal may, under sections 111 and 113 of the Code, sue in his own name upon a simple contract in writing made with his agent, and in the agent's name, of which the principal is the sole owner. *Erickson agt. Compton*, 471.

The heirs of a person dying intestate, must be sued together jointly and not separately, for a debt against the decedent. *Kellogg agt. Olmsted*, 487.

But the statute does not make them jointly liable as joint debtors, *id.*

PER-CENTAGE. SEE COSTS. *Sprong agt. Snyder*, 11.

SEE COSTS. *Mann agt. Tyler*, 235.

SEE COSTS. *Sands agt. Sands* 453.

PLEADING, in action of slander, SEE SLANDER. *Graham agt. Stone*, 15.

" " " *Sayles agt. Wooden*, 84.

" " " *Pike agt. Van Wormer*, 99.

The requisites of an answer in an action of slander. *Lewis agt. Kendall*, 59.

Hypothetical pleading is not allowed. *Sayles agt. Wooden*, 84.

Different causes of action in the same complaint not allowed. *Alger agt. Scoville and others*, 131.

Has the Code blended common law and chancery pleadings and moulded them into one system, so that now the same rules apply to all actions; or are different rules to be applied according to the nature of the action whether equitable or legal? *Wooden agt. Waffle*, 145.

The principles of pleading under the Code, fully discussed, *id.*

In actions commenced before a justice of the peace, where a plea of title is interposed, must afterwards be conducted according to rules of pleading and practice in Supreme Court. *Jewett and wife agt. Jewett*, 185.

Where the answer contains allegations of new matter, a reply is necessary in the Supreme Court as in other actions, *id.*

An answer, commencing as an answer to the whole complaint, and assuming to answer the whole, but containing facts which only constitute a defence to a part of the complaint, is bad, on demurrer. *Thumb agt. Walrath*, 196.

An allegation that the party "believes" a fact to exist, is equal to an allegation that the fact exists "as he believes." *Howell agt. Fraser*, 221.

If a pleading is correct in substance, but not in form, the remedy is by motion not by demurrer, *id.*

In action of slander, SEE SLANDER. *Annibal agt. Hunter*, 255.

" " " *Gray agt. Nellis*, 290.

Where it does not appear from the face of the complaint that another action is pending for the same cause, the objection should be stated as a defence in the answer (§ 147) otherwise by demurrer (§ 144). *Hornfager agt. Hornfager*, 279.

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The subject of stating separate causes of action and defences under the Code fully discussed, *SELDEN, J. Benedict agt. Seymour*, 298.

SEE ANSWER, *Seward agt. Miller*, 312.

*Snyder agt. White*, 321.

*Temple agt. Murray*, 329.

What is a *sham, frivolous, irrelevant or redundant* answer? *Nichols agt. Jones*, 355.

The Code does not authorize a *general demurrer*. What is a general demurrer stated. *Purdy agt. Carpenter and Ferris*, 361.

It is not necessary to aver *express malice*, or *want of probable cause* in a complaint for *libel*, *id.*

Pleadings in actions of slander and libel. SEE SLANDER, *Brown agt. Orvis*, 372.

An admission of a fact alleged in an answer by failure to reply, authorizes the court to disregard a report of referee or the verdict of a jury found to the contrary of such allegation; but a reply may be allowed *nunc pro tunc*. *Willis agt. Underhill*, 396.

Statements insufficient to constitute a defence in an action for libel. *Budington agt. Davis*, 401.

A statement of *set off* in the answer, § 149 is a defence under § 150. *Ranney agt. Smith*, 420.

All the *set off* may be included in the same statement of new matter, *id.*

The defendant in an action under the Code can set up in his answer matter falling short of a defence, by way of recoupment in mitigation of damages. *Willis agt. Taggard*, 433.

An answer should cover all it professes to answer, and no more, *id.*

It seems a *set off* may be set up by answer, although it be not claimed as a full defence. It is good as far as it goes, *id.*

The distinction between pleas in *abatement* and pleas in *bar* are not abolished by the Code (1851). Therefore an objection in the nature of a plea in abatement can not be taken in a *general answer*, and is waived by an answer upon the merits. *Gardiner agt. Clark*, 449.

SEE PARTIES. *Ricart agt. Townsend*, 460.

The 160th section of the Code, providing for striking out irrelevant and redundant matter, was not intended as a substitute for a demurrer. *Harlow agt. Hamilton*, 475.

The allegations in a pleading which are to be taken as true, if not controverted by the other party, are *material* allegations. Nothing is admitted by an omission to answer it, but what is well pleaded, *id.*

In reference to proceeding in cases of frivolous pleading, *id.*

If a party make a distinct, though immaterial allegations, and in a traversable form, he can not move to strike out his adversary's pleading, taking issue thereon. *King agt. The Utica Ins. Co.*, 485.

PRACTICE, where the defendant only, notices the cause for trial, and omits to move it at the circuit, when he had opportunity, he can not afterwards at a special term move for the dismissal of the complaint, because

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- the plaintiff did not notice or bring to trial. The 23d rule, it seems, was not intended to embrace such a case. *McCarthy agt. Hancock*, 28.
- Where irregularities in settling a bill of exceptions are complained of in the appellate court, they will stay proceedings for an application to be made in the court below (where it properly belongs) for correction. *People agt. Baron*, 81.
- Where there is an issue of law and an issue of fact joined in a cause, no judgment for costs can be entered in favor of the party who prevails upon the issue of law until the issue of fact is disposed of. *Masters agt. Barnard*, 113.
- An issue of law on demurrer under the Code of 1849, might be brought on to argument at a special term held in a different county in the district from that indicated as the place of trial in the complaint, without first applying to the court to change the place of trial. *Ward agt. Davis*, 274.
- Where a new trial is granted on application of the defendant, a copy of the order must be served on the plaintiff's attorney before the defendant can move for a dismissal of the complaint, for not proceeding to trial. Otherwise, where a new trial is granted on motion of the plaintiff. *Robb agt. Jewell*, 276.
- A non suit will not be set aside, *on special motion*, on the grounds that the judge received evidence prematurely, or refused to submit to the jury a question of fact proper for their determination. Erroneous decisions of the judge on the trial, can be corrected only on a case or bill of exceptions. *Craig agt. Fanning*, 336.
- In relation to entering *two judgments* on affirmance from the special to the general term—not allowed. *Eno agt. Crooke*, 462.
- The decisions of a referee upon the whole issue can not be reviewed nor a rehearing granted by a special term. *Simmons agt. Johnson*, 489.
- PRINCIPAL AND AGENT**, the drawer of a draft who signs as "agent" is not personally liable, where the principal is known. *Hicks agt. Hinde and Beardsley*, p. 1.
- A principal may, under sections 111 and 113 of the Code, sue in his own name upon a simple contract in writing made with his agent, and in the agent's name, of which the principal is the sole owner. (*The rule was otherwise in this state before the Code.*) *Erickson agt. Compton*, 471.
- PROCESS**, a justice of the peace, before he is authorized to issue a warrant for the arrest of a person, must be satisfied upon the examination on oath of the complainant that a *criminal offence* has been committed. And in the warrant the accusation must be recited. *Wilson agt. Robinson*, 110.
- SEE EXECUTION. *Lucas agt. Johnson*, 121.
- SEE " *Corwin agt. Freeland*, 241.
- As under the former practice, so, under the Code, "that after a *general appearance* by the defendant, he can not be heard objecting on account of the *irregularity of the process*, by which the action was commenced." *Webb agt. Mott*, 439.



**PROPERTY**, a "wagon" is by no act of the legislature exempt from levy and sale under execution. *Morse agt. Keyes*, 18.

In an action to recover possession of personal property, defendant can not be arrested, where the plaintiff has the property delivered to him. Plaintiff has his election, but can not have an arrest and delivery of the property at the same time. *Chappel agt. Skinner*, 338.

Property exempt from execution by the provisions of the Revised Statutes (2 R. S. 367), can not be taken upon execution issued upon a judgment rendered for other exempt property.

The provisions of the Revised Statutes in regard to property exempt from execution are not affected by the additional act of 1842.

The case of *Matthewson vs. Weller* (3 *Denio*, 52), so far as it seems to hold a different doctrine, overruled. *Cole agt. Stevens*, 424

(*The last three paragraphs above, are the corrected head note to the case of Cole agt. Stevens*, 424. *The original head note is wrong so far as it differs from this. See ERRATUM.*)

**RAIL ROADS**, the requisite evidence required to disprove the facts alleged in the petitions of the company, for taking lands for their roads. *Buffalo and State Line R. R. Co. agt. Reynolds and Wife*, 96.

Proceedings on appeal taken from report of Commissioners. *N. Y. and Erie R. R. Co. agt. Coburn*, 223.

Proceedings on appointment of commissioners to appraise damages for taking lands for rail road. *Troy and Rutland R. R. Co agt. Cleveland*, 238.

A suit can not be legally commenced against a Rail Road Corporation (for loss of baggage or any thing else), by the service of a summons upon a "baggage master" in their employ. He is not such a "managing agent" as the statute contemplates. But a *general appearance* waives the irregularity of such a service. *Flynn agt. Hudson River R. R. Co.*, 308.

An action against a common carrier, under the Code, sounds in tort, *id.*

Proceedings and evidence in matter before Commissioners appointed to appraise damages of lands taken for rail road. *Rochester and Syracuse R. R. Co. agt. Budlong*, 467.

**REFEREES**, a referee has no authority to report that the defendant is entitled to judgment of a *dismissal of the complaint*. *Holmes agt. Slocum*, 217.

A referee has no power to dismiss a complaint and turn a party out of court for unreasonable neglect to proceed in the cause. Nor to order an amendment of the pleading, or to change the issue which the court has sent to be tried, *id.*

In relation to bringing a cause to a hearing before them, *id.*

In reference to their jurisdiction where they have not been sworn, &c. *Whalen agt. Supervisors of Albany*, 278.

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The provisions for reviewing a report of referees by a rehearing under § 272 of the Code of 1849, are *repealed* by the Code (or act) of 1851. *Church agt. Rhodes*, 281.

There being no saving clause in the act, it sweeps away all inchoate proceedings, *id.*

The decisions of a referee upon the whole issue can not be reviewed nor a rehearing granted by a special term. *Simmons agt. Johnson*, 489.

The report of a referee to whom all the issues are referred, must state all the material facts put in issue and found by him, as well as his conclusions of law. The unsuccessful party has a right to have these placed upon the record. *Van Steenburgh agt. Hoffman*, 492.

No notice of the report or service of a copy thereof is necessary before entering up judgment, *id.*

*It seems*, in all cases every material issue should be passed upon, at least, if desired by the parties, *id.*

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**SERVICE**, the *service* of a summons by publication is not effected until after the expiration of the time for publication. *Moore agt. Thayer, &c.* 47.

In motions that are to be heard on the pleadings, it is never necessary to serve *copies* on any of the parties to the suit. *Newbury agt. Newbury*, 182.

Service of a summons upon one with whom a person of unsound mind resides, is not good service. It should be upon the defendant himself, and if he has a committee also upon the committee. *Heller agt. Heller*, 194.

Service of order granting a new trial on defendant's motion. *Robb agt. Jewell*, 276.

**SHERIFF**, the liability of a sheriff in an action for escape. The distinction between *void* and *voidable* process, to protect him. *Hutchinson agt. Brand*, 73.

**SLANDER**, in actions of slander where the defendant denies the charges in the complaint, he can not set out in his answer matters in mitigation of damages which do not constitute a defence to the action, or which could not be proved on the trial. *Graham agt. Stone*, 15.

Only matter constituting a defence to the action is properly pleadable, *id.*

Whether justification is proved or not (under the Code), mitigating circumstances may be given in evidence, *id.*

An answer to a complaint for slander, in alleging facts and circumstances in justification of the words alleged to have been spoken, is bad on demurrer, where such facts and circumstances alleged do not constitute a criminal offence. *Lewis agt. Kendall*, 59.

The requisites for an answer in an action of slander, *id.*

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In pleading to an action of slander, it is not a sufficient justification to answer, that if the words were spoken as stated in the complaint, they are true. The defendant must state such facts as will show that the plaintiff is guilty of the crime imputed to him. *Sayles agt. Wooden*, 84.

What words are actionable in themselves; and those which require averments. *Pike agt. Van Wormer*, 99.

The Code has changed the common law rule of pleading, in not requiring averments showing the words were intended to apply to the plaintiff where it is uncertain in the complaint to whom they do apply, *id.*

Evidence of general character not to be given in evidence, under a general denial. *Anonymous*, 160.

In slander, an answer justifying the speaking of the words, must confess the speaking thereof. *Anibal agt. Hunter*, 255.

An answer merely stating that the words spoken are true, is insufficient as a justification, it should state the facts which go to constitute the crime imputed, so that an issue, either of law or fact may be framed, *id.*

Where a count in a complaint in slander sets forth the speaking by the defendant at a day and place certain actionable words, and alleges also, that the defendant on divers days and times between that day and the commencement of this suit, spoke the same words, a demurrer, assigning for cause that separate causes of action are united, or that the complaint is vague and uncertain, will not lie. *Gray agt. Nellis*, 290.

The words objected to may be struck out as redundant, *id.*

It is not necessary to aver *express malice* or *want of probable cause* in a complaint for libel. *Purdy agt. Carpenter and Ferris*, 361.

The general rule in pleading a defence, in an action of slander or libel before the Code, was that the matter alleged in the (plea or) answer must be such as constituted a complete defence to so much of the (declaration or) complaint as it professed to answer. The Code (§ 165) has made one exception only to this rule, that in case justification is pleaded and not otherwise, mitigating circumstances may be alleged, so that in case of failure in making out a justification, the mitigating circumstances may nevertheless be proved. *Brown agt. Orvis*, 376.

But allegations in an answer which would not be allowed to be proved, even in mitigation of damages, should be stricken out as irrelevant, *id.*

A charge of dishonesty in the capacity of a merchant's clerk, is of itself, actionable, *id.*

Statements insufficient to constitute a defence in an action for libel. *Buddington agt. Davis*, 401.

SUMMONS, the service of a summons by publication is not effected until the expiration of the time for publication. *Moore &c. agt. Thayer &c.*, 47.

Civil actions are commenced by summons, § 127, *id.*

Service of summons on a lunatic should be personally, and also on his committee, if any. *Heller agt. Heller*, 194.

A defendant has twenty days to appear and answer, after the expiration of the time prescribed by the order for publication of summons. Also where service has been personally made out of the state. *Tomlinson agt. Van Vechten*, 199.

**T**IME, notice of motion to correct a pleading must be given within twenty days after service of such pleading (*Rule 43*). Hence the affidavit upon which the motion is founded, should show that the pleading was *served* and *when served*. *Rogers agt. Rathbone*, 66.

A defendant has twenty days to appear and answer, after the expiration of the time prescribed by the order for publication of the summons, also where service has been personally made out of the state. *Tomlinson agt. Van Vechten*, 199.

The court will not regard fractions of a day in judicial proceedings, unless to prevent injustice. *Jones agt. Porter*, 286.

**TRIAL**, the place of trial of a transitory action. *Jordan agt. Garrison*, 6.

A majority of witnesses should not necessarily control, *id.*

After issue joined in an action to recover the possession of personal property and a stipulation to try, the plaintiff again neglected to bring the cause to trial, but entered a rule to discontinue and tendered costs. *Held*, that the defendant could not move for the dismissal of the complaint and a judgment for the return, &c. His remedy since the Code is, to notice the cause for trial and then to take such judgment as the case may require. *Wilson agt. Wheeler*, 49.

A motion to change the place of trial can not be made before a written demand for the required change is made under § 126 of the Code. *R. R. Co. agt. R. R. Co.*, 106.

But the change is not effected, after the proper demand has been served under that section, until the order of the court upon the motion, *id.*

How and where an issue of law may be tried, \* *Ward agt. Davis*, 274.

A new trial granted on defendant's motion, he must serve a copy of the order on plaintiff's attorney before he can move to dismiss complaint; otherwise where new trial granted on plaintiff's motion. *Robb agt. Jewell*, 276.

A motion for a new trial or rehearing, on the ground of surprise or newly discovered evidence, may be made and granted after judgment. *Merse-reau agt. Pearsall*, 293.

The grounds stated for denying such motions, in certain cases, *id.*

In an action in the nature of a quo warranto, the place of trial may properly be laid in any county in the state. *People agt. Cook*, 448.



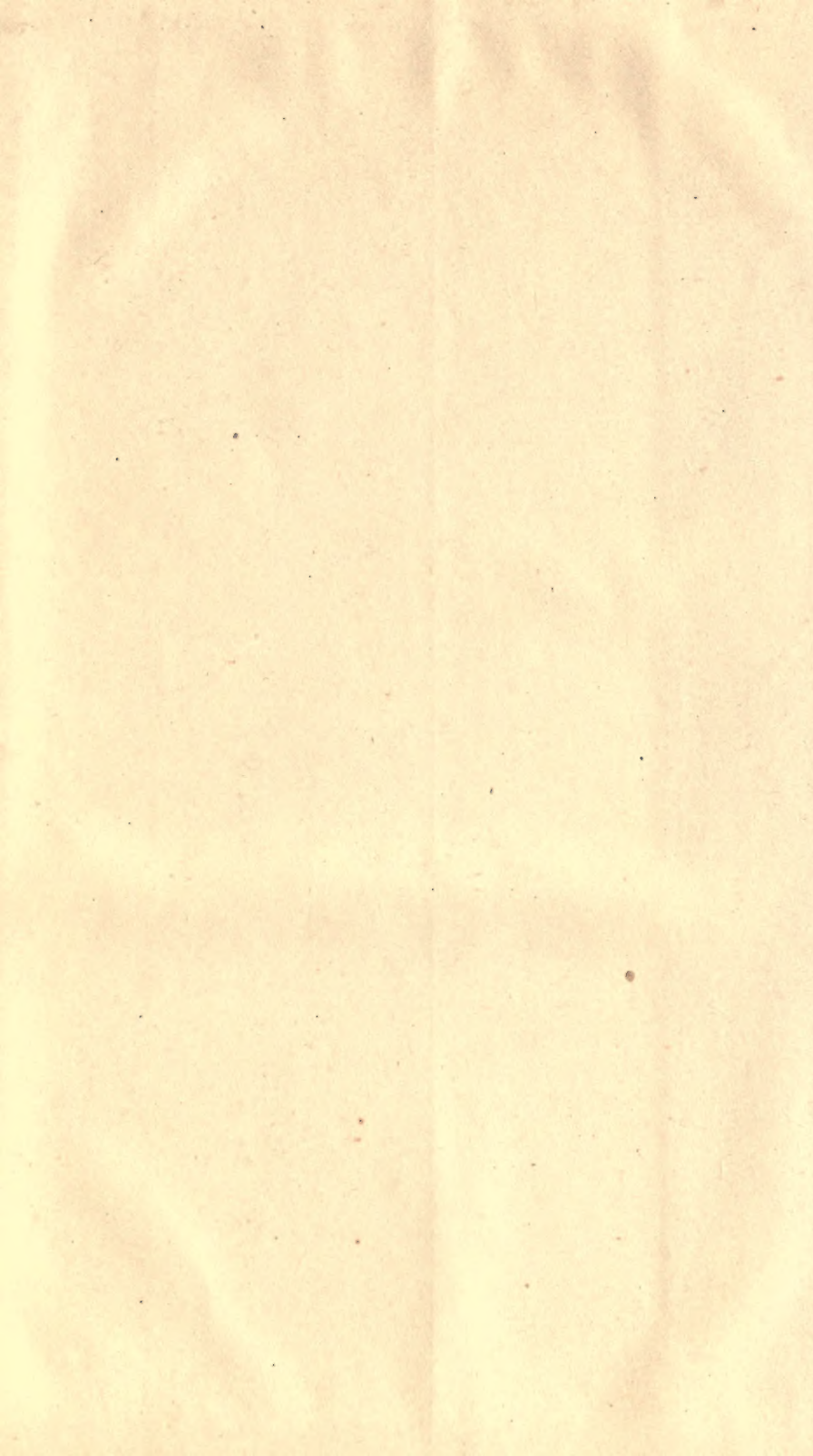












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